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DECISIONS AT CHAMBERS

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SINGLE JUSTICES

OF THE

SUPREME COURT

OF THE

HAWAIIAN ISLANDS:

Admiralty, Criminal, Equity, Law, and Probate.

NOT APPEALED FROM, AND NOT HITHERTO REPORTED.

1866 - 1889.

HAWAIIAN REPORTS, VOL. VI.

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Justices of the Supreme Court

DURING THE PERIOD COVERED BY THIS VOLUME.

CHIEF JUSTICE AND CHANCELLOR:

ELISHA H. ALLEN, appointed June 4, 1857: resigned Feb. 1, 1877.

CHARLES C. HARRIS, appointed Feb. 1, 1877: died July 2, 1881.

ALBERT FRANCIS JUDD, appointed November 5, 1881.

FIRST ASSOCIATE JUSTICE AND VICE CHANCELLOR:

GEORGE M. ROBERTSON, appointed Jan. 10, 1855: died March 12, 1867.

ALFRED S. HARTWELL, appointed Sept. 30, 1868: resigned Feb. 18, 1874.

CHARLES C. HARRIS, appointed Feb. 18, 1874: promoted Feb. 1, 1877.

ALBERT FRANCIS JUDD, appointed Feb. 1, 1877: promoted Nov. 5, 1881.

LAWRENCE MCCULLY, appointed November 5, 1881.

SECOND ASSOCIATE JUSTICE:

ROBERT G. DAVIS, appointed Feb. 16, 1864: resigned July 8, 1868.

JAMES W. AUSTIN, appointed July 10, 1868: resigned July 10, 1869.

HERMANN A. WIDEMANN, appointed July 10, 1869: resigned February 18, 1874.

ALBERT FRANCIS JUDD, appointed Feb. 18, 1874: promoted February 1, 1877.

LAWRENCE MCCULLY, appointed Feb. 1, 1877: promoted Nov. 5, 1881.

BENJAMIN H. AUSTIN, appointed Nov. 5, 1881: died July 5, 1885.

EDWARD PRESTON, appointed July 7, 1885.

THIRD ASSOCIATE JUSTICE:

RICHARD F. BICKERTON, appointed December 29, 1886.

FOURTH ASSOCIATE JUSTICE:

ABRAHAM FORNANDER, appointed Dec. 29, 1886: died Nov. 1, 1887.

SANFORD B. DOLE, appointed December 28, 1887.

This book has been compiled by order of the Justices of the Supreme Court.

Volumes I. and II. Hawaiian Reports, comprising the period 1847-1865, contain not only decisions of the Supreme Court in Banco, on appeal, but also those of single Judges, not appealed from.

Volumes III. IV. and V. contain only decisions of the Full Court.

The present volume is made up entirely of decisions of Single Judges, at Chambers, not appealed from, from 1866 to date, arranged chronologically. Many of these decisions have been printed in the local newspapers, revised contemporaneously by the Judges who wrote them: more than one-third of them have never appeared in print, but have been found by searching the records in the Clerk's office, and are given *verbatim*. Cases involving only questions of fact have generally been omitted. Cases found too late for insertion in their proper order are added in an Appendix.

Head-notes and Index are by the compiler.

Honolulu, October, 1889.

CORRECTION.

Page 676. The case of *Unna vs. Brown* was appealed to the Full Court, who affirmed the decree below. The case will be reported in 7 Hawaiian, and should not have appeared here.

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DECISIONS
OF
Single Justices of the Supreme Court
OF THE
HAWAIIAN ISLANDS,
NOT APPEALED FROM.

ESTATE OF KEALIIAHONUI.

IN PROBATE. BEFORE ROBERTSON, J.

NOVEMBER, 1866.

The Court declines to revoke the probate of a will, granted in 1855, upon a petition filed over eleven years later, alleging said will to be a forgery.

The same amount of proof should be demanded in support of such petition as would be required to convict the parties implicated upon a criminal prosecution for forgery.

Not being convinced beyond a reasonable doubt that the will is a forgery, the Court declines to revoke probate.

DECISION OF ROBERTSON, J.

On the petition of Kapiolani, David Kalakaua, and others, for revocation of the probate granted by this Court on the 16th day of February, A.D., 1855, of the will of the late A. Kealiiiahonui.

The burden of proving the alleged forgery and fraud rests entirely on the petitioners, and, in my opinion, before the Court could grant a decree revoking the judgment admitting the will to probate, the same amount of proof ought to be demanded in support of the petition, as would be required to warrant the conviction of any of the parties implicated, in case of a criminal prosecution for the alleged forgery or perjury.

Although the evidence presented on behalf of the petitioners is sufficient to raise a considerable amount of suspicion as to the genuineness of the instrument in question, yet, after a very thorough and deliberate examination of all the evidence, I cannot say that I am convinced beyond a reasonable doubt that the instrument, admitted to probate as the will of A. Kealiihonui, is a forgery, and therefore I must refuse to grant a decree of revocation as prayed for.

A. F. Judd & R. H. Stanley, for petitioners.

C. C. Harris & J. W. Austin, for respondents.

Honolulu, November 30, 1866.

ANTOINE SAMPSON *vs.* BENJAMIN PEASE.

IN ADMIRALTY. BEFORE ALLEN, C.J.

AUGUST, 1867.

In a suit for damages by a sailor against his captain for flogging; the Court awards libellant \$100.

Relative duties of master and crew, defined and considered.

DECISION OF ALLEN, C.J.

This is a libel in personam filed by Antoine Sampson against Benjamin Pease, master of the schooner Blossom, to recover damages for ill-usage, namely, in tying him in the rigging and administering on his back fifty-eight blows or lashes with a rope, whereby, as he alleges, he suffered severely.

The libellant admits the general allegation of the flogging, and justifies, on account of the improper, insolent, and mutinous conduct of the libellant.

The libellant shipped in Honolulu in February last, as cook and steward on board the Blossom for a voyage to the southern and western islands, touching at the Island of Ascension and such other places as the Captain might order, and thence to return to this port, where the schooner arrived in July last.

It appears in evidence on the part of the libellant, that while the schooner was at anchor at Ascension, the master returned from the shore one evening, and called the libellant and said to him that "he was going to put him in the rigging in the morning, because he had been sleeping with a woman," or as one of the witnesses testifies, "his woman." It is in evidence that he did so, and that he struck him more than fifty blows; he would administer a few blows, then desist, and then apply more, till libellant said he would go back to his duty. The witnesses called by libellant testify that he was very much cut and bruised in the back by the rope, which was exhibited in Court, and which was a 2-inch rope; they say further that the libellant denied having any intercourse with the woman, and there is no evidence which sustains that charge.

It appears in evidence on the part of the libellant that on the day before the flogging, the mate ordered him to go below and get some bread for the men, and he refused to do so because it was not his duty, whereupon a dispute arose, and abusive language was used by libellant. He did get the bread, however. It is also in evidence that the mate and libellant were intoxicated. The mate testifies that he was insolent to him at the time of the occurrence, and picked up an axe, but put it down when he told him to do so; he was pretty well intoxicated. He says further that the men complained of want of provisions. At the time the captain and mate seized him to put him in the rigging, he was in the galley; took up a sheath-knife, made a motion, and laid it down. He called upon the men to help him, but none came. After the flogging he got breakfast, and lost no

time by reason of the chastisement, since which he has behaved very well.

There is some conflict of evidence in relation to the size of the rope, but one of the witnesses testifies positively that the 2-inch rope which was produced in Court was the identical rope.

Mr. Benson testifies that he saw the libellant worse for liquor several times, and that he asked him for liquor but he refused to give it to him. He was, on the occasion of the order given for the bread, insolent to the mate, although he eventually got the bread. He saw the flogging, and he says the lower part of the back was swollen, but he saw no cuts or blood.

It appears that a chief, with some women and children, came on board, and one of the witnesses testifies that the chief complained about libellant interfering with single women. Mr. Benson testifies that both the mate and libellant were intoxicated on the day of dispute about the bread. There is also evidence tending to show that interference with these women would promote dissatisfaction among the natives, and render the vessel insecure. It is in evidence also that there were prostitutes on board.

The principles of law applicable to master and seamen are very clearly defined. The master has the sole and exclusive command on board the vessel, and all those who have shipped are under obligation to obey his lawful commands. He has a legal right to chastise a seaman for disorderly and disobedient conduct, but it must be done in a reasonable manner, and very plainly appear by the evidence that it is merited, and that it is inflicted with due moderation.

The counsel for the libellant contends that no punishment can be lawfully inflicted when the master does not witness the act complained of, unless upon inquiry of those who knew the facts, and an opportunity is offered the person charged to defend himself. This is undoubtedly a sound legal proposition, and just and proper in itself. [Conkling's Admiralty, 219.]

It is in evidence that the master had the opinion and advice of others on board in relation to the conduct of the libellant, but

he gave no opportunity for defence. His denial of the charge did not make the master pause in his determination to punish him. He was entitled to be heard.

It is contended by the counsel for the libellant that "a seaman is not bound to obey an unlawful command, and may resist with what force is necessary." But upon examination it will be found that neither by the ancient or modern maritime codes has it ever been allowed seamen to interpose by force, unless it is to prevent the officers in command from committing flagrant crimes in their presence or through their agency, such as piracy or felony, or unless in case of a ship which is unseaworthy when she enters upon the voyage. In such cases the seamen have a right to refuse duty to continue the voyage, and they may compel the master to return to port. But this must be a very clear case. In cases of doubt, the opinion of the master and officers is much more worthy of confidence than the crew. Seamen do not ship to put their lives to any extraordinary hazard. It is part of the contract that the vessel is seaworthy, and if they are seduced to go in one that is not, they may refuse obedience. *United States vs. Ashton*, 2 Sumner, 17; *The Moslem*, Olcott, 297. Judge Story in the case of *United States vs. Cassidy*, 2 Sumner, 582, says: "If a person substituted as master be grossly incompetent to the duties of his station from want of skill, or bad habits, or profligacy, or cruel behavior, the seamen may be justified in refusing to do duty, or to remain by the ship." The doctrine applies to extreme cases, and to carry it farther would jeopardise the command, as well as the discipline of the ship.

The libellant had shipped to perform certain duties which are very well known among mariners, and when he was ordered by the mate to bring the bread, it was his duty to have done so, and he had no right to disobey the order. But it seems by the evidence that he relented and obeyed. This incident would present a different appearance if the mate had regarded the law, which it was his duty to do, or if the libellant had not ultimately obeyed. Men entrusted with command must first learn to govern their appetites and passions, and in its exercise they can appeal with

confidence to the laws for protection and aid. It is contended further by the counsel for the libellant, that the mate said he would not report this offence to the master, and that this is full condonation. But the Court is of opinion that the mate has not the power to pardon offences committed on board, even in the absence of the master, so that it would be a lawful defence should the master deem the delinquent worthy of being held to answer for such acts. The Admiralty regard seamen as wards, and it is upon the necessity of adopting this principle that they are not entrusted with power where any especial prudence or discretion is required. It must be an extreme case that a seaman would be justified in resisting the master with force.

Any other doctrine would be dangerous to the police of the sea. As Judge Ware says, in the case of *Carlton vs. Davis*, Davies Reports, 226, "The duty of a seamen in such case, is to submit to wrong. The nature of the master's authority, which is *quasi* parental authority, and the necessities of the service, imperiously require it. On his return to port he may appeal to the law for redress, and the master will be held to strict responsibility for any abuse of his authority."

With this extraordinary power with which the master is invested, he is held to responsibilities corresponding with it. It is his duty so to conduct the police of the ship as to cause no unnecessary tendencies to disorder. Before he should complain of his men for intoxication, he should see that his officers are free from it. On the day on which it is alleged that the libellant refused to go for bread, it is proved by the witnesses for both parties that the mate was intoxicated so much that he went into the cabin and slept till the master returned at evening. Such examples should not be placed before the men, and if they are, the responsibility must rest where it rightfully belongs; and the consequences to the order of the ship, and the discipline of the crew, are with the master and officers. It is in evidence that the liquor was kept in a demijohn, in a berth in the cabin; that the mate had access to it, and that as the libellant was intoxicated, it is a reasonable inference that he took it without leave.

It was a neglect of duty on the part of the master to permit liquor to be placed where it could be reached by the men. For this act of insubordination I hold the master and his mate mainly responsible; the former for permitting the liquor to be exposed to the libellant, and the latter as giving his example of intoxication. The mate was not capable of command on this occasion, and it is usual that a person under the influence of liquor is unreasonable, often insolent in his language, and unjust in his requirements.

In addition, the master in permitting lewd women to be on board violated the laws of good discipline as well as of good morals. He could not have resorted to a more certain cause of disturbance.

It becomes a master, before he justifies punishment as necessary to the discipline of the ship, to see that his own discharge of duty is promotive of this most essential object. If he permits intemperance in his officers on duty, it is to be expected that the seamen will imitate their example. The Court do not justify the seamen, but at the same time it is a palliation to insubordinate conduct. If the master permits lewd women on board, he violates the law of discipline in the first instance, and he cannot expect his crew will do better. Before a master can justify successfully, he must not only have discharged his duty properly, but he must not have permitted acts and doings on board calculated to influence the crew to disorderly conduct. In view of all the evidence of the case, I am of opinion that the libellant is entitled to damages. He does not, however, come into Court without fault, for it is in proof that he followed the example of the mate and became intoxicated, and as usual under the excitement which liquor necessarily causes, he was insubordinate; were it otherwise, I should award him larger damages than I propose to do. But under the circumstances, even if he was worthy of punishment, it was clearly excessive. I think he is entitled to \$100 damages and costs.

Andrew J. Lawrence, proctor for libellant.

A. F. Judd & W. C. Jones, proctors for respondent.

Honolulu, August 20, 1867.

NAPUA ZUPPLEIN *vs.* J. W. AUSTIN, Administrator, &c.

IN EQUITY. BEFORE ALLEN, C.J.

OCTOBER, 1867.

The Court construes a will to intend that the testator's property shall be held in trust for the benefit of his widow and son during the widow's life, with remainder in fee to the son; holds that the devise to the son did not lapse by his death before his mother, and orders the trustee to pay half the income to the son's representatives during the widow's life, and after her death to transfer the whole estate to the son's heirs.

DECISION OF ALLEN, C.J.

This is a bill in Equity, in which the complainant alleges that Henry Zupplein executed a will in February, 1860, by which he gave all his estate to Robert W. Holt and Asher B. Bates, his executors, first for payment of his debts and funeral expenses, and secondly, the remainder to be held by them in trust for the use and benefit of his wife, Kekuahiwa, and his only son, William, during the natural life of said wife, accounting for the use and profit of the same, one half to his wife and the other half to his son, and upon the decease of his widow, to pay the expenses of her last sickness and her funeral, and then to transfer the remainder of his estate to his son William, his heirs and assigns, for his and their use and benefit forever; that upon the death of the testator shortly after, Mr. Bates, one of the executors, the other not accepting, procured probate of the will, and assumed and discharged the trusts therein imposed until he left this kingdom in March, 1864, when J. W. Austin, Esq., was duly appointed by the Court of Probate in his place, and remains administrator and trustee of said estate; that William, the only son of Henry Zupplein, died in January, 1866, having previously executed a will by which, after some small bequests, and after stating that his mother, Kekuahiwa, was

fully provided for by his father's will, he bequeathed the rest of his estate, whether in present possession or in expectancy, to his wife Napua, her heirs and assigns, and constituted J. W. Austin executor; that this will was admitted to probate and the said executor qualified; that Kekuahiwa, widow of Henry Zupplein, is still alive; that complainant is the widow of William, and is entitled as his heir to one-half the use and profit of the estate of Henry Zupplein, and upon the death of Kekuahiwa, to the remaining half. She states that she has applied to the executor of her husband's will for such one-half proceeds of Henry Zupplein's estate, but he refuses, and alleges that he is prevented by Kekuahiwa, who claims the entire estate. Whereupon the complainant prays the Court to cite the said Kekuahiwa and J. W. Austin to answer these allegations, and for a decree upon the trustee to pay her one-half the use and profit of Henry Zupplein's estate during the lifetime of his widow, and upon her death to make over the whole of it to herself, her heirs and assigns.

The defendant, Kekuahiwa, admits in her answer the allegations in the bill in relation to the will of Henry Zupplein and the course of the trusteeship as set forth, and also the execution of William Zupplein's will, but denies that the plaintiff is entitled thereby to the half of the use and profits of Henry Zupplein's estate, and upon the death of his widow, to the whole estate; but claims that she herself is entitled by lapse to the immediate possession of the whole estate of her late husband as heir-at-law under our statute of descents, as if he had died intestate and without issue, and that the trust is now extinguished. She submits to the judgment of the Court whether any of the devised estate ever vested in William Zupplein, and whether complainant is entitled, as she sets up, to the present use and profit of one-half, and on defendant's death to be invested of the whole estate.

The answer of J. W. Austin agrees with that of his co-defendant. He admits the amount of property received by him in assuming the trusteeship of Henry Zupplein's estate, \$18,042.82,

and some small parcels of real estate, as enumerated in the bill, and that he had declined to account to the complainant for one-half the use and profit thereof, inasmuch as his co-defendant claims adversely, and he has doubts as to the proper and legal construction of the will. He prays for the direction and order of the Court as to whether the estate of Henry Zupplein vested in William Zupplein upon the decease of his father, and whether the trust under the said will has become extinguished.

The first question which arises in this case is, what is the true construction of the will? The principles of construction are well defined. It is recognized by all the authorities that the intention of the testator as indicated in the will must prevail, unless it is in violation of some rule of law. A will is therefore to be construed so that all its parts, when considered in relation to each other, shall form a consistent whole.

It is very evident from the language of the will that the testator intended that the income of his entire property should be enjoyed in equal parts by his wife and son during her life, and it was a wise provision to place the property in the hands of trustees for this purpose, for it rendered it safer perhaps than any other mode. If, then, this is the purport of the will, it is very clear that the trust must continue at least during the life of Kekuahiwa; for were the Court to decree its termination, the security of the income of the property to the wife might be impaired and the intention of the testator defeated. This must guide the Court, unless it is in violation of some rule of law. It is contended by the counsel for the respondent that the widow is entitled, by reason of a lapse, as heir at law and under the statutes, to the whole estate remaining of her late husband, in the same manner as if he had died intestate without issue. There is no doubt of the general rule that all devises are lapsed if the devisee dies in the lifetime of the testator; but in the case at bar, the testator died before the devisee.

A lapsed devise is when the devisee dies after the making of the will, and before the testator.

The Court have examined the authorities of the counsel with

great care, and we find a material distinction between them and the case at bar. The counsel contend that the trustees took an estate determinable at the death of Kekuahiwa, or by the death of William before such event. The language of the will is, that after the payment of the debts and funeral expenses, the trustees are to hold the remainder of all the estate, real, personal, and mixed, "for the use and benefit of my wife Kekuahiwa and my only son William, during the natural life of my said wife, accounting for the use and profit of the same, one-half to my wife upon her request, and the other half to my son William, and upon the decease of my said wife, to pay the expenses of her last sickness and funeral; and then to transfer all of the remainder of my estate to my son William, his heirs and assigns, for his and their use and benefit forever."

No language can be more explicit. The death of the son prior to the mother was evidently not contemplated by the testator, so far as we can judge by the language of the will, and although it has taken place, it certainly cannot impair the duties and obligations of the trust so far as the widow is concerned. It is the express language of the will that she shall have one-half of the use and profits during her life, and that under the administration of trustees. The intention of the testator undoubtedly was to render the property more secure by placing it in the hands of gentlemen competent to manage it, and to exempt the widow from the care of the business.

The will provides, say the counsel further, that the trustees are to hold the remainder, after payment of debts and funeral expenses, for the use and benefit of mother and son during the natural life of the mother, paying each one-half profits, and after the mother's death to transfer the remainder. He does not say to whom, but the will does in these words: "to my son William, his heirs and assigns, for his and their use and benefit forever." The intention is very clear that the father devised the income of the property to the wife and son, so that they could enjoy it equally during her life, and then it should pass to him, his heirs and assigns. This is not only the language of the will, but it is exactly what you would expect the father to do.

It is further contended that the trust to Austin is extinguished. By the terms of the will it shall continue during the life of the widow; no other event than her death can terminate it. This provision is not in violation of law, and it is what the testator had a right to make and therefore it is not competent for the Court to annul it.

The counsel for the respondent contends further that no estate vested in William, or descended to complainant under his will.

Washburn, Vol. 2, 222 defines a remainder to be an estate or interest in lands or tenements, to take effect in possession or enjoyment immediately upon the determination of a prior estate, which is created at the same time and by the same act or instrument, and upon which such first-mentioned interest is made to depend. This definition is in conformity to Blackstone, Coke, Littleton, and Fearn. Where it is a remainder after a life estate, it is regarded as a vested remainder, and the possession only is postponed. 2 Jarman on Wills, 52. An estate devised to A for life, with a remainder to B in fee, who is a known person in *esse*, is known as a vested remainder. 2 Wash., 224.

A testator gave his wife the income and improvement of all his estate, real and personal, so long as she should live and remain his widow, and the remainder, after the decease or marriage of his widow, to be distributed in the same manner as if it had not been devised. The Court held that on the death of the testator his children took a vested remainder in fee. *Whitney vs. Whitney*, 14 Mass., 88. In the case of *Dixon vs. Pickett*, 10 Pick., 518, the Court sustains the doctrine that if the estate of A. is a vested remainder, it descends to his heirs, notwithstanding he died during the continuance of the life estate. By the terms of the will, Kekuahiwa has a life estate, upon which her son William has a remainder. It was created at the same time and by the same instrument, and thereby became vested.

In the case of *Wight vs. Shaw*, 5 Cush., 56, it appeared that the testator had devised land to his son during his natural life, but

if he should marry and have children, then at his death to his children, lawfully begotten, and his heirs forever. The son married and had six children, lawfully begotten. It was held by the Court that each of the children took, under the will, a vested remainder in one-sixth part of the land devised, and that the decease of the tenant for life was not the contingency on which the share of the children became vested estates; but the time designated when the precedent estate was to be determined, and the children to enter into the actual possession of the estate as their own in fee simple. This doctrine is supported by all the decisions in the same Court. *Nash vs. Cutler*, 16 Pick., 491; *Heard vs. Hall*, 16 Pick., 457.

In the case of *Shattuck vs. Stedman*, 2 Pick., 468, the testator had devised to his niece the interest of \$1,000 during her life, and at her decease the principal sum to be divided among her children. A son of the niece survived the testator, but died before his mother, and it was held he took a vested legacy. 2 Powell on Devises, 241; *Winslow vs. Goodwin*, 7 Met., 363; *Digby vs. Digby*, 5 Mass., 535. In this case the son was to enjoy, immediately on the death of the testator, one-half of the income of the estate; and on a certain contingency, namely, the death of his mother, which in the course of natural laws was inevitable, the whole of the estate should pass to him and his heirs forever. There was no contingency as to the persons who were to take, but merely as to the happening of the event on which they were to take possession of both the real and personal estate as their own.

The postponement of the payment of a legacy does not prevent the legacy from vesting. The time applies to the payment, but not to the legacy itself. *Hixon vs. Oliver*, 13 Vesey, 108.

A bequest after the death of a particular person is held not to denote a condition that the legatee shall survive such person, but only to mark the time at which the legacy shall take effect in possession, that possession being merely deferred on account of the life interest given to the person on whose death the gift is to take full effect. *Makim vs. Keighley*, 2 Ves., 333.

In the case of *Blumue vs. Geldart*, 16 Ves., 313, the Master of the Rolls says that in the present case, if the testator had given the stock to his wife for life, and at her death to George Pringle, it would have been clear that he would have had a vested interest in the nature of a remainder. By the will the interest was given to one for her life, and to the other the capital at her decease. In effect and substance he took a remainder, which became vested immediately upon the testator's death, and was not defeated by his own death in the life-time of the wife.

It may be considered an established doctrine that when money is bequeathed to be invested in the purchase of an annuity, and the legatee dies before the person upon whose death the investment is to be made, it will be regarded as a vested legacy from the death of the testator. *Barnes vs. Rowley*, 3 Ves., 323, and note and the authorities cited. *Dawson vs. Killett*, 1 Brown, C. C., 107.

It is very evident from the authorities that the bequest to William Zupplein did not fail by his death in the life of his mother. It was not made, by the terms of the will, dependent on his surviving her.

The counsel for the respondent contends that Henry Zupplein, by his will, left his estate to trustees for the use and benefit of his wife Kekuahiwa, and if so, then the survivor would take the whole during life. Estates will be taken to be held in common, and not in joint tenancy, unless it shall be expressly said that the grantees, feoffees, or devisees, shall hold the same lands jointly, or as joint tenants, or to them and the survivor, or unless some words are used which show an intention that the same shall be held in joint tenancy. 16 Pick., 491.

It is very clear that it was the intention of the testator that all his estate, real and personal, should be transferred, after termination of the life estate and a discharge of the trust, to his son William, his heirs and assigns. He treated both species of property in the same way; it was to be held and enjoyed by the same person. Under our code the descent of real and personal property is to the same person. There is no distinction, and

the uniform rule gives symmetry to the whole doctrine of descent, and prevents many perplexing questions which arise under the English law on this subject.

By the will a trust was created and trustees appointed, one of whom accepted the trust and performed the duties till he made application to the Court to be discharged, when the Court appointed J. W. Austin trustee in his place, who received, he says in his answer, \$18,042.82, and some parcels of real estate. He was duly clothed with the office of trustee, and the trust property became legally vested in him during the life of the widow Kekuahiwa.

I am of opinion that the trust is not yet complete, and will not be till the death of the widow and the payment of her funeral expenses. The income of a divided moiety of the estate may be different from one-half of the income of the whole estate. Be this as it may, the terms of the will are precise on this point. The estate was vested in the son on the death of the testator, subject to the widow's life interest in one-half the income of the whole property, both real and personal, but nothing passes to the executor of the son William, till the estate for life terminates, and the conditions of the trust are fulfilled, except one-half of the income.

The Court therefore decree that the respondent (Austin), in the discharge of the office of trustee under the will of Henry Zupplein, pay one-half of the income from the property, both real and personal, to the widow Kekuahiwa, and one-half to the executor of William Zupplein during the life of Kekuahiwa, and as the entire estate vested in the son on the death of the testator, subject to the life estate of the mother, at her death, agreeably to the terms of the will, he must pay and deliver the same to the executor of the last will and testament of William Zupplein, the son, to be applied according to the terms and conditions of said will.

Costs to be paid from the income of the estate.

Messrs. Judd, Jones and Lawrence, for complainant.

Messrs. Stanley and Austin for respondents.

October 5, 1867.

AININI *vs.* KALA.

IN EQUITY. BEFORE HARTWELL, J.

JUNE, 1869.

Courts of Equity have no more discretionary powers than Courts of Law; they decide cases on principles as fixed and certain as those of common law.

A deed set aside for fraud, it appearing that the grantor was aged and ignorant; that the price was inadequate, and that the grantor reposed trust and confidence in the grantee, of which the latter took undue advantage.

DECISION OF HARTWELL, J.

The Bill, after setting out the complainant's title to certain land on Nuuanu street, Honolulu, avers that in November, 1868, the respondent asked her to lease to him for thirty years, at an annual rental of \$5, her dry, or kula land, the same being a small portion of her said land, and that she agreed so to do; that December 2, 1868, complainant went, at respondent's request, to the house of one Kahale, where one Levi Keliipio produced a paper as the lease agreed upon, and read the same to her, partially, as a lease, said Keliipio and the respondent falsely stating to her that the same was a lease of the said portion of her land, and that the complainant believing said statement, and not knowing how to read or write, affixed her mark to said paper, acknowledged the same before the Register, and received \$5 as the first year's rent; that complainant, about December 10, 1868, obtained a copy of said paper, from which it appears that the same was not a lease of her kula land, but a warranty deed of sale of all her land, the value whereof was at least \$600, and which she never desired or intended to sell; that she was advised and assisted by no person in this transaction, but acted solely upon the statements falsely and fraudulently made to her as aforesaid by the respondent and said Keliipio.

The complainant tenders in Court the \$5 paid her, and prays that the said instrument be declared void, and the respondent ordered to deliver up and re-convey to her the premises.

The answer denies that respondent ever requested a lease, or that any conversation about a lease ever occurred between the parties, and avers that for many months previous to said November, complainant had been supported by respondent, at his house, and that she desired him to go and live upon her said land, but fearing to be molested by complainant's relatives, he declined so to do unless she would sell the land to him; whereupon the complainant agreed to sell, declining the respondent's suggestion to reserve to herself a life interest; and the deed in question was drawn by her instructions. The averments in the Bill of false and fraudulent statements are denied, but it is alleged that the deed was read and explained to the complainant, as a deed of sale, in the presence of several witnesses, before whom she acknowledged the same, and that when acknowledging before the Register, she assented to his question if it was a "palapala kuai" (deed of sale).

The answer further avers the respondent to be the son of one Paliola, a woman related to the complainant, and her aikane from early youth, and that by Hawaiian custom the complainant regarded the respondent as her own son, and desired to sell the land to him to protect herself against the encroachments of one Kunahihi, her nephew, who had sold her house from off her land and thrown her movables out of doors.

BY THE COURT.

The complainant seeks to have the Court exercise its equity jurisdiction by setting aside a conveyance of land, and declaring void a deed of sale which, on its face, appears to be good in law. This is an important case, as are all cases involving questions concerning titles in land. Particularly in this country, it is desirable firmly to maintain those rules of law and statute, by which land titles are secured under deeds executed with all solemn formalities. Real property would scarcely deserve its

name, if, except for strong and clear reasons, parol evidence were admitted to supersede duly executed and recorded instruments under seal.

Nevertheless, equity jurisdiction is granted to protect the helpless and ignorant against their own improvident acts, to which they have been induced by false representations from those in whom they had reposed especial trust. Violations of trust, and undue advantage taken of credulity and ignorance, furnish the groundwork of a large number of cases in which equity relieves.

It is popularly supposed that the province of Equity is to set aside the rigid rules of common law and ancient precedents, and to decide arbitrarily, according to the merits and hardships of each case. Nothing is further from the truth or more full of danger to the administration of justice than such a doctrine. Under the Constitution and Laws, no Court can exercise a discretionary power in defiance of sound and established principles, both of law and equity. "There are certain principles on which Courts of Equity act which are very well settled. The cases which occur are various, but they are decided on fixed principles. Courts of Equity have, in this respect, no more discretionary power than Courts of Law. They decide new cases as they arise by the principles on which former cases have been decided; but the principles are as fixed and certain as the principles on which the Courts of common law proceed." Lord Redesdale, in *Bond vs. Hopkins*, 1 Sch. and L., 428.

First: What was the consideration of this deed?

There is some evidence on the part of the respondent that he had agreed, in part payment, to support the complainant, but the deed sets out no such agreement, and it is denied by the complainant. The complainant may have expected to live with respondent in a house he was to build on her kula land, and this may have been an inducement to her to sell or lease; but the evidence on this point is not entirely satisfactory. Probably there was a friendly feeling between the parties; the complainant in her short stay in Honolulu had lived in respondent's

house, and he was an adopted son of a brother of her aikane, Paliola. Her near relatives here, a nephew and two nieces, had not supported her, but whether this was from inability or unwillingness, does not appear. The evidence shows no hostility existing between her and these relatives, and does not sustain the allegation in the answer that they had sold her house and thrown out her furniture.

The respondent's counsel argue that while the consideration expressed was sufficient to support the deed, the real consideration was that of love and affection, and was sufficiently expressed by the deed in the words "keiki a kuu aikane." A good or meritorious consideration—by which is usually intended a consideration of love and affection between parties related by blood or marriage—or a valuable or pecuniary consideration, however small, may support a deed. Nor is there anything to prevent one, so far as he is himself affected, from making a deed of gift of land. The statute of 27 Eliz., said to affirm the common law, only avoided voluntary conveyances in favor of subsequent *bona fide* purchasers for value. Admitting that the relations shown to exist between the parties would be sufficient to form a good consideration, and that deeds here are often drawn in an inartificial manner, still I cannot regard this as a deed of gift. The words "keiki a kuu aikane" merely describe the grantee. The deed expressly makes \$5 the full consideration and makes no reference to any other. If the complainant had intended to give away her land I think she would have said so, and that the deed would hardly fail to express such intention.

The witness Kahale testified that the respondent gave him \$5 to say that this was a deed of sale, whereas he knew it was a lease. I do not, however, place much confidence in this witness. It is not likely that he alone, of those present at the execution of the deed, would have been bribed, nor would it seem necessary to bribe him. Probably none but the attorney knew a lease from a deed of sale on hearing it read, nor could they know how much of the deed was read. They might not note

the exact description of the premises. The witness Mele says: "perhaps the consideration was \$5 a-year, or \$5"; she is not sure, as she did not attend particularly.

To support the allegation of an agreement to lease the kula land, the witness Kamaka testifies that he had heard the respondent say he would take a lease for thirty years at \$5 annual rent, and he heard complainant say he might have it. Kailimai, Kamaka, and Akoni testify that the day after the date of the deed, the respondent said he obtained such a lease, and Mr. Beckwith testified that the complainant made such a statement to him.

Previous agreements to lease are not inconsistent with a private sale, and both parties may have private reasons to call this a lease, contrary to the fact. Kala may have wished to avoid trouble with the relatives, and Ainini may have been induced to retract. But I must look at all the circumstances of this transaction. The complainant's entire interest in this land was worth from \$600 to \$800. She is evidently aged, ignorant, and dependent. A lease of the kula land for thirty years might not, as argued, be an insufficient consideration, so as to raise a presumption that a sale might as well have been intended. The statement of the witness Mele, made inadvertently, seems to indicate that some yearly payment was mentioned. The trade seems to have been kept secret from Ainini's relatives, who would naturally have been consulted, or at least been informed of any proceedings which were fair and above board. But the complainant placed confidence in the respondent, and considering this fact, and her age and infirmities, the Court will scrutinize this alleged sale with jealous eye. *Jenkins vs. Pye*, 12 Peters, 253. The burden of proof is on the respondent in a case like this, to show that the bargain was fair and just, and that confidence was not betrayed. *Huguenin vs. Basely*, 14 Ves., 271; *Chesterfield vs. Janssen*, 2 Ves., 156.

Especial haste appears in the deed being acknowledged before the Register, at his private residence, immediately after it was executed. There seems to have been an immediate denial by

the complainant that she had sold her land, as soon as those acting in her behalf, or their own, had learned that a deed of sale had been recorded.

I am of opinion that this deed was made improvidently—being undue advantage taken of a position of trust to drive an unfair bargain with this aged woman, or else that the deed was fraudulently obtained. In either case, it is void.

I had, at first, some doubt whether the deed should not be reformed into a lease, but if a part of the inducement for the lease was that the respondent should support the complainant, it would be a hardship to remit her to his tender mercies. I regard the whole transaction as an imposition on the complainant, and not as a case of mutual mistake or *paris delicti*.

I accordingly decree that the deed be declared void, and that the respondent deliver up and re-convey the premises to the complainant.

Notice given of exceptions, and appeal to the full Court.

A. F. Judd for complainant.

R. G. Davis & R. H. Stanley for respondent.

June 30, 1869.

H. THOMPSON *vs.* J. MONTGOMERY *et al*, Inspectors of
Election.

MANDAMUS. BEFORE HARTWELL, J.

JANUARY, 1870.

Demurrer is not a plea in bar; if overruled, judgment on the record is given.

Plea in abatement suggests defects in form and substance; if overruled, Defendant may answer over.

A Taxpayer, who had not paid taxes till after they were delinquent, held to be "qualified to vote;" and mandamus issued to compel Inspectors of Election to give him a certificate.

DECISION OF HARTWELL, J.

The plaintiff took out a rule *nisi* for the defendants to show cause why they should not be compelled by writ of mandamus to insert his name on the list of persons qualified to vote, and to give him a tax receipt with the words "qualified to vote" written thereon.

The plaintiff's petition avers that he has all the legal qualifications of a voter, especially that he had paid his taxes December 31, 1869, and asked the said Luce, as tax collector, to give him a receipt with the words "qualified to vote" thereon written, and asked the said Montgomery, Luce and Castle, as Inspectors of Election, to insert his name on the voter's list, which they declined to do on the ground that he had not paid his taxes before the end of November.

The answer, neither admitting nor denying the facts, claims that the plaintiff's petition is insufficient in law to entitle him to the writ prayed for, on the ground that it sets forth no neglect by the defendants of any duty imposed upon them by law, and does show their full and faithful performance of the same, and that they should not be compelled to answer further. The defendant's counsel claimed that the answer was in the nature of a demurrer on which, if over-ruled, judgment would be given to answer over, and that he had the right to open and close. He was allowed to open and close, the Court looking upon the answer rather as a motion to dismiss.

PER CURIAM. A question of pleading arose which must be referred to. A demurrer is not a plea in bar, but attacks the plaintiff's right of action on the ground that he presents a case insufficient in law, and it is deemed to admit facts well pleaded; if overruled, judgment on the whole record is given.

A plea in abatement suggests defects in form or substance, not apparent in the record, as that the summons is signed by one not authorized to sign it, of which the plea offers verification, and prays that no further answer be required; on such a plea, if overruled, judgment is given to answer over. A motion to dismiss is for defects apparent on the record, as that the summons is not signed at all.

The answer declines to admit the facts, and claims that no further answer be required, but it presents solely the question of the insufficiency in law of the plaintiff's case, and it is to be treated as a demurrer.

The constitution provides that every male subject shall be entitled to vote, who, among other qualifications, "shall have paid his taxes," and "shall have caused his name to be entered on the list of voters of his district as may be provided by law."

An argument was made that any law requiring payment of taxes in November to entitle one to vote, makes a new qualification not required by the Constitution, and is therefore unconstitutional. If it were necessary to decide that point, I should not hesitate to say that it is not only the right, but the duty of the legislature to provide a reasonable and convenient mode of ascertaining who possess the constitutional qualifications of voters.

The statutes require assessors, by September 1st, to return to the Governor a list of tax-payers, which list the Governor is to deliver to the tax collector; "and said collector shall proceed immediately to collect according to the same; provided however, that it shall be his duty to add to said list any person not included thereon liable to assessment;" if after notice by the collector to pay his taxes, any person shall neglect to do so until the last day of November, the collector may levy execution for the taxes. By the last day of December the collector is to pay over all sums collected by him. Civil Code §§ 500, *et seq.* By the act of 1868, assessors register the names of all voters qualified according to the provisions of the Constitution, and the collector, using the list prepared by the assessor, and adding names "of all those who shall have paid in to him their taxes within the time prescribed by law, who may possess the requisite qualifications to vote, but who may have been omitted to be registered by the assessor," prepares and furnishes, on or before the last day of December, a full list of the Inspectors of Election. "For the purpose of elections, every tax-collector

shall be supplied by the Minister of Finance with a blank tax receipt * * which shall bear conspicuously upon it, in printed letters, the words 'qualified to vote,' and it shall be the duty of every tax-collector, upon receiving the payment of the taxes due from any person in other respects entitled to the franchise under the provisions of Section 2 of this Act, to fill out and deliver to every such person one of the tax receipts so impressed." (Sec. 10, Act 1868.) The Inspectors shall hold two sessions, the last not less than ten days before election, "for the purpose of receiving evidence of the qualifications of persons who may not have been previously registered by the assessor or collector, and who may claim a right to vote," as well as to correct, by erasing names improperly on said list.

If the Inspectors find any names to have been omitted from the collector's or assessor's lists of persons having the legal and requisite qualifications of voters, they are to require the collectors to deliver to such persons a tax receipt endorsed with the words "qualified to vote," and are to insert such names, with those upon the previous list, upon the Inspectors' list of voters.

Such in substance are the statute provisions. It will be seen that the duties of the assessor and collector are ministerial only, and those of the Inspectors are, to some extent, judicial in their nature, and not merely mechanical or ministerial. The collector thinks he could not give the petitioner the receipt desired, because his taxes were not paid by the end of November. But the law does not require this condition. Certainly, the Inspectors, in examining the evidence of claimant of the suffrage, are bound by no such restriction; they have a wider field of inquiry, no less and no more than the laws and Constitution afford. If they find in the laws and constitution nothing which requires them to place on their list of voters only those who have paid their taxes voluntarily by the end of November, they will not assume such payment to be a pre-requisite to voting. No such requirement upon them appears in the laws. The plaintiff appears to have paid his taxes December 31, before

any levy was made therefor, and I am of opinion that his delay has not caused him to lose the right to vote.

Let a writ issue as prayed for.

The defendant's counsel stated that although the facts were probably as charged, yet he desired to argue that he was entitled to judgment to "answer over," and that he should have so argued earlier, had he not understood from the Court that his answer would be treated as a motion to dismiss. The Court stated that the question would be open for argument whenever it should arise hereafter.

Exceptions and also an appeal were claimed, but the Court ruled that no exceptions were allowed by statute, and that appeals from the issuing of a process or writ were expressly prohibited by statute, but that the question could be brought to the full Court on writ of error at any time.

A. F. Judd, for plaintiff.

S. H. Phillips, for defendants.

Honolulu, January 22, 1870.

IN RE GIP AH CHAN.

HABEAS CORPUS. BEFORE HARTWELL, J.

AUGUST, 1870.

In *habeas corpus* it is not competent to try over again the merits of a cause in which there has been a legal judgment pronounced, and mittimus issued by a Court of lawful authority; the only facts to be considered are those disclosed by the return; if the return shows illegality of proceedings, *habeas corpus* is the proper remedy.

In a petition for *habeas corpus*, brought by a servant imprisoned for desertion under the Master and Servant Statute, the Court considers that a decision as to the constitutionality of the law is not called for, although no doubt exists of the right and duty of the Court to decide such a question, when necessarily raised in *habeas corpus*.

A mittimus held fatally defective for not mentioning the name of the master to whom the servant is ordered to return.

The Court declines to hear evidence as to the invalidity of the contract by reason of fraud, duress or assignment without the servant's consent, those being matters within the Police Magistrate's jurisdiction.

No contract for personal services can be penally enforced by a Police Justice, except under the Master and Servants Act, and the present contract failing to comply with that act by reason of being assigned to parties not designated by name, and who cannot be ascertained precisely, the prisoner must be discharged.

DECISION OF HARTWELL, J.

[As printed in the *Hawaiian Gazette*, August 10, 1870.]

The petition for a writ of *habeas corpus* was filed July 2d, by W. C. Jones, the prisoner's attorney, and states that the prisoner is illegally restrained of his liberty for no criminal matter, by J. H. Coney, Sheriff of Hawaii, by virtue of a process issued by D. H. Hitchcock, Police Justice of Hilo, at the suit of one R. V. Husbands; a rule was made to show cause why the writ should not issue.

The Attorney-General argued that the petition failed to show a *prima facie* case; that it should set forth the precise cause of detention if known, and that the writ should be denied, unless it appeared that the process under which the prisoner is held was not voidable merely, but actually void.

Mr. Stanley opposed the rule, in behalf of W. L. Green, the legal representative of Theophilus Metcalf, of the agent Husbands, and of the owners of the Metcalf plantation, whose names were not specified, with the exception of Gilbert Waller, claiming as one-fifth owner. Mr. Stanley argued that the case showed no probable cause and no want of jurisdiction in the Magistrate, and that in any case the writ should not issue to deprive parties of their rights to appeal or error.

Messrs. Thompson and Jones argued in support of the rule, that although the writ would be denied if on its own showing

the petition showed a case not within its purview, a specific statement, further than to allege illegal restraint for no criminal matter, was not requisite. The Court ordered the petition to be amended by statement of the cause of detention, whereupon the petitioners filed an amendment, reciting the process under which the petitioner is held. At a further hearing on the rule, Mr. Thompson argued that the process was issued under a void law, inasmuch as the prisoner was guilty of no crime, and Article 11 of the Constitution prohibits involuntary servitude except for crime; that the mittimus was void as it does not show the names of the agents and owners of the "Met. Plantation," and because it prescribes no limit to the time of the imprisonment, and is issued under section 1420, regardless of the amendment of the Act of 1860, which limits the imprisonment in this class of cases to a term not exceeding three months.

Mr. C. C. Harris, in behalf of the heirs of Theophilus Metcalf, argued against the rule, that this proceeding was not intended for an inquiry into the merits of the case, which can be done by appeal only. That this was a lawful process of a lawful Court, and must stand until declared void by a full Court on error. That Article 11 of the Constitution was intended against chattel slavery, and not against acts which the law has prohibited. That a crime means a *malum prohibitum* as well as a *malum per se*; that if the mittimus is defective from vagueness, this is not the mode to test its validity. That the amended law of 1860 refers only to second commitments by the magistrate, and it does not appear that this was such. That the Court will never issue the writ unless the law under which the magistrate acted is palpably and unanswerably unconstitutional.

Mr. Jones, in reply, argued that the writ of *habeas corpus* is a mode of exercising appellate jurisdiction in cases like this. It was thereupon ordered that the writ do issue as prayed for, returnable July 23, at which day the Marshal made return of the body of the prisoner, alleging the cause of his detention to be the mittimus of which a duplicate was set forth in the amended petition. Time was asked by Messrs. Stanley and

Harris to answer, and was fixed for July 27, at which day they filed this plea, viz: "And now come the undersigned, attorneys for the representatives of the Metcalf Plantation, and for answer submit that the return to the writ of *habeas corpus* is not full, in that it only sets forth a mittimus, and whereas in truth and in fact the subject matter in litigation before the Police Court at Hilo was desertion of the petitioner from service under a contract like unto the copy on file, but that the contract used in evidence, and under which the petitioner was brought before the Police Court of Hilo and tried, contained an endorsement in the words and figures following, to wit: 'I, J. S. Rogers, in consideration of the sum of \$150 to me paid by Theo. Metcalf, do hereby assign this contract unto the said Theo. Metcalf, his representatives and assigns under the agreements and covenants within contained, which are to be done, kept and performed by the said Theo. Metcalf.

Witness my hand this 27th day of July, A.D. 1865.

(Signed)

J. S. ROGERS.

Witness:

(Signed)

WM. G. IRWIN.'

"Also that the records of the Court will show that R. V. Husbands, who made the complaint against the petitioner for desertion from service under such contract, was the agent of the representatives of Theo. Metcalf and manager of the Metcalf Plantation, and the undersigned submit that the return to the writ of *habeas corpus* should be amended and, if thereafter traversed by the petitioner, that a writ of *certiorari* issue to bring up the record of said Court. All of which the undersigned are ready to verify."

The petitioner admitted the facts alleged in the respondents' plea, and, at the request of respondents' counsel, filed the contract referred to and also the following plea, viz.: "And now at this day comes Gip Ah Chan, alias John Carpenter, alias Ah Sun, by his attorneys, W. C. Jones and Henry Thompson, and for reply to the return and amended return therein, respectfully states, that he admits that the subject matter of the

litigation before the Police Court at Hilo was the alleged desertion of petitioner from service under what purports to be a contract like unto the copy on file herein; he further admits that the said supposed contract, which was brought before the said Police Justice at Hilo, had what purports to be an endorsement such as is set forth in the said amended return; and he further admits that the records of the said Police Court will show that R. V. Husbands, who made the complaint against the petitioner for alleged desertion under said supposed contract, was the agent of the representatives of Theo. Metcalf and manager of the Metcalf Plantation.

“And thereupon, the petitioner avers that the said supposed contract was never executed by him; that he never executed any contract, but that under glowing promises of high wages and a prospect of speedy wealth in a foreign country, to him indefinite, he was induced to go on board the Prussian ship *Matador*, then lying in the Port of Macao, in the Empire of China, about the beginning of the month of June, A.D. 1865, and that some days after he had been on board the said ship, the paper purporting to be a contract now on file in this Court was thrust into his hands without his knowing the nature of its contents, and without any signing or executing of the same by him; that in company with many other of his countrymen he was carried by the said Prussian ship *Matador* to these Islands, where the said ship arrived about the 21st day of July, A.D., 1865; that he, in company with forty-nine of his countrymen, was landed without his consent and without knowing his destination; that he was sent to the Metcalf Plantation, on the Island of Hawaii, without his consent and without any knowledge of his destination; that he has there been forced to work and labor without his consent on said plantation, up to the time that he left the same about the 20th of June, A.D., 1870, and that since that period he has been held to service and labor without his consent by the representatives of said estate, until the time he left as aforesaid.

And thereupon the petitioner alleges:

1. That said supposed contract is not a legal document made under any law of this kingdom.

2. That any assignment of a contract for labor, provided such contract is valid and obligatory, without the consent of the laborer contracting, is illegal and void; and that the supposed transfer on what purports to be a contract on file herein, or the supposed assignment of the same, without the consent of the petitioner, is absolutely void in law.

3. That the servitude of the petitioner under the said Theophilus Metcalf and his representatives was involuntary.

4. That on the death of the said Theo. Metcalf, the petitioner was entitled to his discharge under the 1415th Section of the Civil Code, provided that said supposed contract had been obligatory upon him.

5. That the 1420th Section of the Civil Code is in direct conflict with the 11th Article of the Constitution of 1864; and the action of the Police Justice of Hilo under the same and the warrant of commitment are illegal and void.

6. That petitioner was not brought to this Kingdom under and by virtue of any law or authority of the Hawaiian Government.

7. That the Hawaiian Government, through the Board of Immigration, ignored the acts of the alleged pseudo agent of the Peruvian Government, refused to sanction them, or hold any intercourse with the said pseudo agent, and only gave a qualified permission to land the petitioner, together with forty-nine of his countrymen, in this Kingdom.

Wherefore, the petitioner prays that upon a full hearing of the matter, your Honor will discharge him under the writ of *habeas corpus* issued herein, and restore him to his liberty, with his costs in this behalf most wrongfully sustained."

To this plea the respondent's counsel filed this motion: "That so much of the petitioner's answer by way of traverse to return and amended return as is contained in said answer commencing at the words 'and thereafter,' in the 14th line, first page, and ending at the words 'left as aforesaid,' in the 15th

line, second page, and all points of argument thereafter contained, to wit, from that marked 1, to the word 'Kingdom,' in point marked 7 in the third page, be stricken from the answer by way of traverse, the same not being cognizable before this Court in the case now at issue, and impertinent to the point before the Court." The petitioner, with his answer, offered an affidavit, which, being objected to by the respondents on the ground that they were entitled to cross-examine the witnesses, was not admitted. The Court declining to order any part of the petitioner's answer to be stricken out, the respondents filed a demurrer to the portion thereof objected to as being cognizable only before the Court that tried the cause, and the petitioner joined issue. It was argued for the demurrer, that the respondents could not, by these summary proceedings, be debarred from a jury of the country; that this Court is not vested with jurisdiction to revise the action of the Police Court upon the facts alleged before him, nor could it be reviewed here by a single justice. The ruling of the Court appears in the opinion.

Mr. Thompson argued for the motion to discharge. The contract on file, admitted to be the only one on which the prisoner was tried, failed to show any signature by the prisoner, as required by law for its enforcement, nor is any written assent of the prisoner shown to the assignment of the alleged contract. By our statute of frauds, as well as by the Master and Servant Act, both contract and assignment must be signed. There can be no legal assignment of a personal trust. Even in partnership, a *delectus personarum* always exists; only property, like choses in action, and bills of exchange, are transferable by mere assignment of the holder—not contracts for personal service. Metcalf is shown to be dead by the pleadings of his executors and heirs. There is nothing in the assignment, if it were valid, about Metcalf's partners, and all power over the prisoner's person ceased at Metcalf's death. Metcalf could give no third party rights to the enforcement of the service after his own death.

Mr. Stanley, *contra*. The only question is whether this cause

was tried by a Court having jurisdiction under any constitutional law of this Kingdom. There is no doubt of this. The jurisdiction is clearly given under Sections 1418 *et seq.*, Civil Code. This contract was the property of Metcalf and his partners, Tucker and Waller, who have been decided by this Court to have an interest in it. By Section 1425, Waller and surviving partner has rights in the contract. Dormant partners have rights in such contracts. The legality of the assignment, and the effect of Metcalf's death, are not, however, before this Court. It would require evidence to show the facts, as much as any other facts tending to show illegality in the contract.

Mr. Jones, in reply: To give the magistrate jurisdiction, there must be a contract such as the law requires. This alleged contract no more affects the prisoner, or gave the magistrate jurisdiction to imprison him, than if it were a piece of blank paper. The Constitution of this Kingdom, granted in 1864, expressly repeals in Article 78 all laws repugnant thereto, and in Article 11 prohibits involuntary servitude, except for crime. This law, passed in 1859, is thus expressly repealed. There is no pretense that the prisoner has committed a crime: citing *Parsons vs. Trask*, 7 Gray, 476. The mittimus must specify the offense, or it is void; it should show that the prisoner was held to service by Theo. Metcalf, or his representatives. It sets forth no person as plaintiff, nor a suit by any person, nor that the prisoner was tried at all.

Mr. Harris, *contra*. The case of *Parsons vs. Trask*, if authority in Massachusetts, has been followed by no other Courts, so far as known. The decision in that case, if sound, does not apply in this. This contract specifies the place of its fulfilment, the nature of the business, the term of service, and the compensation therefor, and is a contract the enforcement of which is expressly provided for by the laws of this country. There is nothing similar to chattel slavery in the prisoner's condition. This is not involuntary servitude, for it was voluntarily incurred by the prisoner's own act, and may be avoided whenever he will consent to execute his contract. He has agreed to do certain

things. This is free, voluntary action. A slave had no right to wife, child, or to anything on earth, nor did any law or agreement, except his master's orders, govern him. As to the defects alleged in the mittimus, the common law is not the law here; in this respect, no rule or practice of any Court of this Kingdom requires a mittimus to set forth anything not contained in this. Only such defects will be considered as make the mittimus clearly void. Smith's Lead. Cases, 819. It must be a clearly unconstitutional law which would lead one justice of this Court to declare it to be so, contrary to the reiterated view of the Legislature. Metcalf's death is not in evidence, but admitting it, we still have a right to the judgment of the lower courts on the effect of our contract, and of all the circumstances relating to it. It is a contract to serve another, and such other as Rogers might indicate, and Rogers is not dead. The Court will consider only: 1, whether the magistrate acted under a visibly valid law; 2, whether the proceedings are free from irregularities which do not affect their validity; 3, whether the judgment was under the law, and authorized by it.

Mr. Jones, in reply. In questions affecting the liberty of the subject, the Court will weigh every argument very carefully. These proceedings strike at the liberty of the man. This contract is before the Court. It is in three languages: English, Spanish, and Chinese. The English is headed, "Emigration to the Sandwich Islands;" the Spanish, "Emigracion China Para el Peru." It is invalid on the face of it for want of mutuality. Slavery has grades. This is like Mexican peonage.

PER CURIAM. I am aware of the importance attached to some of the questions raised in this case, and I have given my entire attention to the arguments and considerations presented by the learned counsel.

During the progress of the cause, the question of the nature and extent of the inquiry which may be legally made under a writ of *habeas corpus* arose upon the respondent's demurrer to the petitioner's reply.

I ruled that if the return showed a judgment not authorized

by law, or that the prisoner was condemned for an offence not known to the law, or that the proceedings were based on a law which is in violation of the Constitution of this Kingdom, or that events like the insanity of the prisoner, or death of the master, had occurred since the trial, *habeas corpus* was the proper remedy; but that it was not competent to try over again the merits of causes which have been tried by a Court of lawful authority and jurisdiction, and on which a lawful judgment was pronounced, and a legal mittimus issued, and that the only facts to be considered in this case are those which are disclosed in the return and amended return. In giving this ruling I reviewed the cases that had been tried in this Court, and gave reasons why the evidence offered by the petitioner was not cognizable in this proceeding.

Of the several objections, within this ruling, offered to the legality of the prisoner's confinement, the most important is that the Act under which he was tried is repugnant to the Constitution, and therefore null and void. It is in the Constitution that we find the guarantees of our rights to life, liberty, and the pursuit of happiness, which that instrument solemnly declares to be inalienable, to be taken from no person "except by due process of law." The written law of England is determined by their Parliament, except in so far as the Courts may declare the same to be contrary to the unwritten or customary law, which every Englishman claims as his birthright. Our Legislature, however, like the Congress of the United States, has not the supreme power held by the British Parliament, but its powers and functions are enumerated and limited, together with those of the Executive and Judicial departments of government, by a written Constitution. No act of either of these three departments can have the force and dignity of law, unless it is warranted by the powers vested in that department by the Constitution. Whenever an act purporting to be a statute passed by the Legislature is an act which the Constitution prohibits, or does not authorize, and such act is sought to be enforced as law, it is the duty of the Courts to declare it null

and void. This is a delicate and responsible duty. The Legislative Department, as a co-ordinate and independent branch of government, is entitled to full confidence and respect, and any encroachment upon its powers by the judiciary would justly be deemed unwarrantable, and would tend to subvert all law and order. But the Constitution imposes upon this Court the duty of administering all laws under the Constitution, and no judge who is worthy of the name dares to shrink from its performance. But the Court is never warranted in declaring a law unconstitutional, unless in cases where the rights of persons are necessarily affected by the law, and where there are no other clear and valid grounds on which the judgment may be based. See Marshall, C. J., in *Ex parte Randolph*, 2 Brock, 472; Shaw, C. J., in *Norwich vs. Hampshire*, 16 Pick., 61; Johnson, J., in *Frees vs. Ford*, 6 N. Y., 177; *Roosevelt vs. Godard*, 52 Barb., 545.

From my view of this case, it will appear that a decision upon the constitutionality of the Master and Servant Act is not called for, and therefore it is improper for me to volunteer to give it. But this must not lead to the inference that any doubt exists of the right and duty of the Court to decide such a question, when necessarily raised in *habeas corpus*, nor that, by not passing upon it now, I either intimate a doubt of the constitutionality or the illegality of that act. In thus expressly confining myself to the points requiring judgment, I disclaim all inferences or presumptions as to my views on other points.

I will first consider the legality of the mittimus, which is in the native language, and may thus be rendered: "To the Marshal of the Hawaiian Islands: Whereas Ah Sun, No. 1, was convicted in the Police Court of Hilo, of the offence of refusing labor, and was then and there sentenced to be imprisoned at hard labor until he consent to return to work for the agents and owners of Met. Plantation: Therefore you are strictly enjoined to execute this sentence.

Given under my hand this 29th day of June, 1870.

D. H. HITCHCOCK,

Police Justice of Hilo."

It is claimed that the mittimus is fatally defective in not limiting the imprisonment to three months, according to the Act of 1860, amending Section 1420 of the Civil Code, and in failing to show by whom the suit is brought, or the date of the conviction and sentence, or that any trial was had. I think it is desirable that the mittimus set forth the offence more precisely, as a "willful refusal" to serve the prisoner's master, naming him, "according to the terms of his contract," or "according to the orders of the Court on a second commitment for the same offence," as these are different offences, requiring different judgments. But in view of the poverty of the native language in words of legal intent, perhaps the words "Hoole hana" (refusing work) may be regarded as sufficiently descriptive of the offence. The amended return, filed by the respondents and admitted by the petitioner, finds that the suit was brought by one Husbands, agent of Theo. Metcalf's legal representatives, and manager of the Metcalf Plantation, for desertion by the petitioner from service under the contract on file. This disposes of several of the objections named. But I do not think, in any view, that the mittimus can be held good in its statement of the sentence, "to be imprisoned at hard labor until he consent to work for the agents and owners of the Metcalf Plantation." There will be agents and owners of this plantation as long as it remains a plantation. Shall the prisoner remain in jail until he dies, unless he consent to work for them, whoever they may be? Is this a sentence which the law can sanction? How can the Marshal ascertain the legal limit of such imprisonment? It is neither his duty nor his right to ascertain to whom the prisoner owes service. He has no discretion to decide whether the prisoner's legal masters are those who owned and were agents of the plantation at the date of the sentence, or at some other date. Section 1419 authorized the justice to order the offender "to be restored to his master," and that he, the offender, "shall be compelled to serve not to exceed double the time of his absence, in the discretion of the Court;" Section 1420 provides that "if any such person shall refuse to

serve according to the provisions of the last section or the terms of the contract," the justice on hearing the case, if the refusal be persisted in, may "commit such person to imprisonment, there to remain at hard labor, until he will consent to serve according to law." Shall any executive officer determine the prisoner's law for him, and decide who may legally claim his services? It may be said that the prisoner should "know his own master." He may have thought so himself, but therein the Court that tried him failed to coincide. It was for the Court alone to decide and make known its decision on that matter.

In Cooper's case on *habeas corpus*, 3 Hawn., 17, the Court discharged the prisoner because his sentence was less than that which the law prescribed, and the full Court on review affirmed that decision. In Apuna's case (see *post*, Appendix), likewise on *habeas corpus*, the prisoner was discharged because the Court had not exercised its functions of sentencing to imprisonment at hard labor for non-payment of fine only, or fine and costs, but had delegated to the Marshal to decide whether to extend the imprisonment to cover costs, or not. This case is far stronger than those. If indefinite imprisonment like this be allowed, there would be little security for the person, and those time-honored safeguards of liberty which the Constitution of this Kingdom has placed around us would be of little value. I regard the mittimus as fatally defective, then, in omitting to name any persons as the masters to whose service the prisoner must return in order to terminate his imprisonment. There are reasons of peculiar force why this degree of certainty is requisite. Take for instance the case of one sentenced to be imprisoned until he consent to serve a person not in being, who has remained in jail until his time for appeal or writ of error has expired, shall he have no remedy by *habeas corpus*, but be told that he should have ascertained this legal impediment sooner, so that the Circuit Justice and Circuit Court might have decided about the facts, and determined the law for him before he came here? See *Feeley's Case*, 12 Cush., 58. That it is proper to discharge the prisoner on *habeas corpus* for such defect, is clearly established by the decision of the full bench in Cooper's case.

I should not hesitate to base my decision upon this point alone, but there are other reasons of perhaps greater force. It is claimed by the petitioner, that on the return and amended return, showing Metcalf's death, and the contract under which the suit was brought, a want of jurisdiction of the magistrate over the prisoner's case appears. The respondent's counsel deny that the Court can take cognizance of Metcalf's death, or of any questions affecting the validity of the contract, or which might arise, admitting the death to have occurred. It was urged by them that these matters require evidence, and an examination of facts and circumstances, which they were entitled to have tried by a jury of the vicinage, and on which they were entitled to the views of the local Circuit Justice and Court by regular appeal, until brought to this Court in banco, for consideration of the legal questions involved; and that they should not, in this summary mode, be compelled to bring witnesses here from a distance, passing by the tribunals established nearer their own door.

If there were controverted facts, or if the contract were not presented at the instance of the respondents, as the basis of the trial in the Court below, and if the respondents were not in Court as the heirs and legal representatives of Metcalf, these views would have force. It will appear that I do give them certain force. I declined to hear evidence tending to show the invalidity of the contract by reason of fraud, duress, or otherwise, or that its assignment by Rogers was not assented to by the prisoner. I cannot decide questions which were properly within the discretion and jurisdiction of the magistrate. I must assume it to be true, that it was proved to the magistrate by legal evidence that this contract with John S. Rogers was legally entered into and signed by the petitioner, and that Rogers assigned the same as alleged to "Theo. Metcalf, his representatives and assigns." But assuming the contract to be all that is claimed for it, I cannot decline to notice these facts, presented on the return and amended return, viz.: That the suit before the magistrate was brought on this contract, indorsed as alleged,

at the instance of Metcalf's legal representatives, and of the owners of the Metcalf plantation, that the judgment was founded thereon, and that the petition now before me is opposed by the heirs and legal representatives of Metcalf, and by one claiming as his surviving partner.

I shall consider these matters solely with reference to the magistrate's jurisdiction. It is scarcely necessary to allude to the well-known principle of law, that the jurisdiction of inferior courts is never presumed, but must affirmatively appear. The jurisdiction must appear as well over the persons to be affected, as the subject matter, or "the judgment will be as utterly void as though the Court had undertaken to act where the subject matter was not within their jurisdiction." *Bloom vs. Burdick*, 1 Hill, 139. In *Ex parte Randolph*, *ubi supra*, Mr. Justice Barbour, after deciding that *habeas corpus* lies only where the process is actually void, says: "for void process is the same thing as if there were none at all; and then the party is imprisoned without any authority whatever. Hence, the question would seem naturally to arise, whether the auditor had jurisdiction in the case—in other words, whether the person and the subject matter are such as to bring the case within the jurisdiction of the Act of Congress—for these are the criteria of jurisdiction." "If a Court assumes to act in a case over which the law does not give it authority, the proceedings and judgment will be altogether void." Cooley's Const. Lims., p. 398; Shaw, C. J., in *Vose vs. Morton*, 4 Cush., 29; and in *Clarke's Case*, 12 Cush., 320.

Had the magistrate jurisdiction over the person and subject matter in this case?

The contract purports to have been made in Macao, in China. Foreign contracts, to be enforceable here against the person, must conform to our laws, particularly to the requirements specified in Section 1418. The only extension in their favor is, that they may be made for ten years, and that no limit is placed upon the age of the servant, whereas domestic contracts can be for only five years, and the servant must be twenty years of age, or have the assent of parent or guardian. Admitting that

this contract is penally enforceable in favor of any person to whom Rogers may assign it, I think the least that the statute requires is, that such persons shall be persons in being and designated by name at the time of the transfer. True, Metcalf may have had dormant or known partners, and they may now be his assigns or representatives. But the contract was not assigned to them as partners, and it is only as surviving partners of a firm that they can claim the benefit of the statute. Section 1425 provides that the contract is discharged at the master's death, unless it was made with a company of individuals, of whom there are surviving partners. A contract made as this was, with Rogers and any to whom he may transfer it, is not a written contract with another, or with any partnership, as is required by Sections 1418 and 1425. This is going back to the original contract, without reference to the assignment by Rogers, for of course Rogers could assign, in writing or by parol, no greater rights under that contract than it secured to himself. I admit that the contract itself contains no stipulation that its assignment shall be in writing, or subject to the prisoner's assent. It provides that the prisoner shall enter into the service of J. S. Rogers for eight years, and that during that period he will "work for the benefit of Mr. J. S. Rogers, or for whomsoever he may transfer the contract."

But no contract for personal services gives a Police Magistrate jurisdiction for enforcing it by imprisonment, in the absence of fraud, except by force of the Master and Servant's Act. No such contract of an adult is enforceable by the common law of England or America. 1 Hurd on Freedom and Bondage, §§143, 211. It is a law deemed by the Legislature to be requisite to the needs of this country, and of the policy of the law they are the sole judges. But as it is a law against the liberty of the subject, its meaning can not be enlarged by intendment or inference by the Courts. This is the old maxim of English law, *Angliae jura in omnia casu libertati dant favorem*. In doubtful cases of Englishmen's rights, the odds shall be in favor of liberty. The magistrate's criminal jurisdic-

tion over these cases is confined by the statute to written contracts signed by the servant, between the servant and another, or others forming a co-partnership. This cannot be denied, and imprisonment on a contract not written and signed, is clearly illegal and relievable on *habeas corpus*.

Even under the strict apprentice acts of Elizabeth, once in force in the American colonies and some of the states of the United States, and to some extent now in force in the latter, the contract was not assignable; for, says Kent, vol. 2, p. 265, upon the master's death, the end and design of this personal trust cease. See *Baxter vs. Barfield*, Str. 1266; *Coventry vs. Woodhull*, Dougl. 134; *Hall vs. Gardner*, 1 Mass., 178; *Davis vs. Coburn*, 8 Mass., 302; *Commonwealth vs. Van Lear*, 1 S. & R., 248.

I do not regard that a contract enforceable under this penal statute, and within its meaning, unless it is in writing, designating the parties either by name, or in such a manner that they can be ascertained precisely at the date of the contract.

It is unnecessary to comment on the wisdom of a statute restricting the enforcement by penal servitude of contracts for labor, to those which are made in writing with another, or with a firm; or on considerations which might arise on a law which allowed the penal enforcement of contracts between parties not named or ascertained at the date of the contract. Nor will I consider what if any force our Statute of Frauds would have on contracts of the latter description; suffice it to say, that the present contract is not, in my opinion, penally enforceable in favor of the respondents, and therefore that it gave the magistrate no criminal jurisdiction over the prisoner. The proceedings at the trial must therefore be held void. Let the prisoner be discharged with costs, except those incurred in consequence of the amendment of the petition.

W. C. Jones & H. Thompson, for petitioner.

The Attorney-General (R. H. Stanley) & *C. C. Harris*, for respondents.

Honolulu, August 5, 1870.

H. MAY *vs.* Schooner SOVEREIGN.

IN ADMIRALTY. BEFORE ALLEN, C.J.

JANUARY, 1871.

When carrier receives goods, burden is on him to show safe delivery, or prove that loss occurred by excepted causes; then the libellant may show negligence of the carrier.

Lamotte vs. Angel, 1 Hawn. 140, considered.

Damage to cargo held to be caused by perils of the sea, and libel dismissed.

DECISION OF ALLEN, C.J.

This is a libel filed against the schooner *Sovereign*, by the owner of cargo brought in the same, from San Francisco to this port, for damage done to the goods in the course of the voyage.

The libel charges that Horace Davis & Co. shipped on board the schooner *Sovereign*, at San Francisco, in good order, and consigned to the libellant at Honolulu, a certain quantity of flour, bread, and crackers in tins, which the master of said schooner has failed to deliver in part, and in good order, to the value of \$459.

The libellant alleges that owing to the *Sovereign* being in an unsound and unseaworthy condition, and owing to careless, negligent and improper stowage, and the large and excessive quantity of freight, and by reason of want of proper care on the part of the master, etc., large quantities of sea water came on board the deck of said vessel, which deck was false and open, by which the merchandise was damaged to the extent of \$459.02.

The respondent admits the shipping of the goods, but denies that any damage was sustained which was not caused by danger of the seas; and he avers that any damage incurred was caused by one of the perils excepted by the bill of lading; that the *Sovereign*, on the 28th November, sailed from San Fran-

cisco, laden with assorted cargo; was then staunch, tight and strong; that the merchandise was well and sufficiently stowed and secured, hatches well secured, caulked, covered, &c.; that the deck was not false, and open or leaky, but sound; that the schooner was well and sufficiently manned, victualed, furnished, &c.; that she encountered rough weather, and gales and heavy seas, which caused her to labor heavily, and that the damage was by winds, weather, and accidents of voyage.

The goods having been received at San Francisco as per bill of lading to be delivered here in good order, and the respondent having failed to fulfil the contract, it is incumbent on him, in order to excuse himself, to show that the damage was occasioned by the dangers of the sea, as that is the only exception in the bill of lading.

The issue is, then, formally made. The principles of law which are recognized as applicable to a case of this kind are very well laid down in the notes in Smith's Leading Cases, p. 338. The carrier is always liable for injuries resulting from his own negligence, including, of course, defects in the means of transportation provided by him. He is therefore liable for those injuries which the violence of motion causes in consequence of his negligence or defective means. By proving the delivery of the thing to be carried by him, the burden of accounting for is thrown upon him, and he may either show the safe delivery of goods, or prove that the loss occurred by one of the excepted causes.

All the authorities agree that after the damage to cargo has been established, it is incumbent on the respondent to show that it was occasioned by the perils excepted in the bill of lading, and in doing this he must show that the ship was seaworthy and well found, and properly manned, and managed in a seamanlike manner, and that the cargo was properly stowed and dunnaged. In the case of *Clark vs. Barnwell*, 12 Howard, 132, the Court say that although the loss occurs by the peril of the sea, yet if it might have been avoided by skill and diligence at the time, the carrier is liable. But in this stage of the case

burden is on the plaintiff to establish the negligence, as the affirmative lies upon him. The doctrine of *Lamotte vs. Angel*, in 1 Hawn., 140, is somewhat at variance with this case, for there the Court say, that to impose upon the merchant the obligation to prove negligence on the part of the carrier would be a great hardship, for he does not usually accompany the ship; he is not acquainted with the incidents of the voyage; whereas, it is an easy matter for the master, when he has used care and diligence in transporting the property, to show that care and the absence of negligence on his part." Practically, there may not be much difference in presenting a case to the Court, but it is clear to my mind that it should be incumbent on the respondent to prove that the loss was occasioned by the perils of the seas, after having done his full duty in furnishing a seaworthy vessel, and sailing her in a seamanlike manner, with her cargo well stowed and dunnaged. After he has thus made a *prima facie* case, the libellant may, of course, introduce rebutting evidence that the loss might have been avoided by skill and diligence at the time.

For the defence the first officer is introduced, who testifies that he has been a mariner for twenty-three or twenty-four years, and has been attached to the Sovereign since November 21st, last; has always served in schooners, except two or three years; has been a master, mate, and foremast hand. "I had often seen this vessel before I went on board in San Francisco, and have known her for eighteen months. She had been newly painted in her upper works, and copper painted on the bottom; her tonnage was ninety-nine tons." He says, further, that she was in a seaworthy condition, in his judgment; that she was well found for a voyage of this kind, in sails and rigging, cables and anchors, manned, and not leaking, and was apparently a strong vessel. "She didn't work or complain," to use his language; the decks were apparently in good order, and so were the pumps. He testifies, further, that they had rough weather before reaching the Farallones, encountering strong winds and a heavy sea; reefed the sails; the vessel labored very heavily;

shipped some water, and lost some lumber overboard; the pumps were promptly attended to; after the heavy weather, the vessel made 180 strokes an hour. On the third day out the vessel labored heavily, and she was hove to; she made no water till the second day out; that the weather was stormy the first fifteen days out, and that she labored heavily; no sails were split or carried away; there was a rip in the mainsail. He says that the vessel was full below, and her deck load was flush with the rail, being some twenty-eight inches high. "We had on, and between decks, some thirty M. lumber; on the coast she would carry forty M. or fifty M. on deck."

The second officer corroborates the testimony of the first officer, and says that they had rough weather and heavy sea on the second and third day out; had to lay under close sail, having a heavy sea all the time; the vessel labored heavily.

One of the foremast hands corroborated the testimony of the officers of the schooner as to her being seaworthy, and also as to the rough weather. He says that the schooner lay-to under trysail and jib at one time, and that a gale made a hole in the jib, and parted the flying-jib stay. At times, part of mainsail was close hauled. He says, further, that the water came on board over the bows, amidships, and quarter, and that the vessel labored heavily most of the way down. He says that the schooner laid to a part of one day; that the foresail was double-reefed; that reefs were taken in the mainsail; that the trysail was set; that the mainsail was old; that the trysail and foresail were good.

The first question to be settled is as to the seaworthiness of the vessel. It appears that the vessel, in the opinion of these witnesses, who have sailed her on this voyage, is staunch and strong, and in all respects seaworthy; that she encountered a gale of wind and heavy sea. They are all experienced seamen. The officers were well acquainted with the sailing of schooners, and the Court is obliged to regard their testimony, unimpeached - as it is, as conclusive in the absence of all opposing evidence.

The next question which arises is as to the sufficiency of the

stowage. On the arrival of the schooner, the U. S. Consul, at the request of the master, appointed Captain McGregor, an experienced shipmaster, to make a survey of the hatches, which he did, and he testified that they were well secured in all respects, and that the cargo was well stowed with proper dunnage, and that it had not shifted, but it was owing to being wet with salt water that the injury arose; the leak was from the deck as the water appeared to have run from one bag to another. This testimony is in corroboration of the testimony of the second officer, who superintended the stowage of the vessel.

But it is contended by the counsel for the libellant, that it was unsafe to have had a deck load of lumber, especially when carrying an assorted cargo. It is in evidence that the cargo did not shift, although a few boards were blown off by the gale. The vessel was deep in the water, and Captain Babcock says that it is not a heavy deck load if the vessel was strong. The mate says he thinks there was some thirty M. on board, above and below, but that on the coast this vessel would carry forty M. or fifty M. on deck. It is very evident, therefore, that this was not an unreasonable deck load for a seaworthy vessel.

It is contended, further, that as the leak was made on the second day out, and near the Farallones, it was the duty of the master to have returned to San Francisco; but the second officer says that it would have been unsafe to have returned, as there was a gale of wind and a heavy sea from the south-east and south-west. The decision of a question of this sort must be left to the discretion of the master; and unless it appears that he was reckless, it is not proper to hold him responsible for any advantage which shippers may suppose they would have derived on taking a different course. It is very evident that the flour was injured before they possibly could have made sail for San Francisco, and more especially before she could have reached that port.

The respondent has shown that the vessel encountered a gale of wind and boisterous weather, and that she labored heavily; that the sea broke on her amidships and on the quarter, and

that she shipped much water, so that it was necessary to keep the pumps in almost constant operation to keep the vessel free. It is very evident that the leak was occasioned by the straining of the vessel in the gale and heavy weather encountered after leaving the port of San Francisco.

After carefully examining the testimony and the principles of law applicable to it, I am of opinion that the damage arose from the dangers of the seas, within the exceptions of the bill of lading, and therefore the libel must be dismissed with costs.

Let judgment be entered accordingly.

A. F. Judd & F. H. Harris, proctors for libellant.

R. H. Stanley, proctor for respondents.

January 9th, 1871.

MIKALEMI *et al.* *vs.* LUAU.

EJECTMENT. BEFORE ALLEN, C.J.

APRIL, 1871.

Decree of distribution, made by Probate Court, does not bar an adverse claim by a party who has not had proper notice to appear.

Testimony as to conflicting claims of heirship considered, and half of the land awarded to each party.

DECISION OF ALLEN, C.J.

This is an action of ejectment. Both parties agreeing to waive a jury, the cause was heard and determined by the presiding Judge of the Term. It is in evidence that Kekoa, at the time of his death, had a Royal patent of the estate in question, and that he died in 1848. The plaintiffs claim by inheritance. Without giving a detailed sketch of the evidence, it is satisfactorily proved that Kekoa had a half-brother named Kahuakai, and that the plaintiffs were his children, and, of course, Mikalemi was his nephew and Kepena his niece.

Kahalau was also a brother of Kekoa, married, but had no

children. He died after Kekoa, and before his brother Kahuakai.

Were the case to rest here, it is clear that the right of inheritance would be with the plaintiffs, and their title to the estate complete. But the defendant says that he purchased the estate of Kalili, the grandmother of Kuohuia, from whom she inherited the property; and Kuohuia was the son of Kaiaina, the nephew of Kekoa. The evidence is somewhat conflicting in respect to the relationship of Kaiaina to Kekoa, but the weight of evidence is that he was his nephew. He was the son of Maihi, who was the sister of Kekoa. This view of the case is strengthened by the evidence that Kaiamo, from whom the defendant claims, had possession of the property in 1848, after the death of Kekoa, and this possession continued in direct line of heirship, from Kaiamo to Kalili, who conveyed it to Luau, the defendant. It is contended further, that the defendant has a title by prescription. When Kekoa died, his wife Kuku survived, and had a right of dower under the statute of 1846. It is not clearly proved when she died, but the evidence is not satisfactory that Kaiamo and his successors had entire possession of the estate for twenty years, claiming the same. It is in evidence that Kuku was the wife of Kekoa.

It is contended further, that Kapiipiilani, who was the son of Kuku, would inherit his mother's moiety, which, by the law of inheritance, she would have from her husband. Her interest being only that of a right of dower, expired at his death. Her husband, Kekoa, died in 1848, and she, by the law then in force, had only a right of dower in his real estate. The law of descent, which gives to the wife one-half of the estate when there are no children, was passed in 1850; therefore, she could not inherit. Her right was merely that of dower; hence, Kapiipiilani had no right of inheritance.

It is contended further, that the property in question became vested in Kalili, through judgment of the Probate Court decreeing said property to her, and by whom the same was conveyed to the defendant.

It is a sound principle of law, and one which will commend itself to the sense of justice of all men, that one cannot be barred personally, by judicial proceedings, without express or constructive notice. There was not sufficient notice in this case, as appears by the record. The intention of distribution was not set forth in the notice; therefore, these parties, the plaintiffs in this suit, are not barred by the decision of the Probate Court, as to their legal right of inheritance.

If I am correct in my view of the evidence, the heirs of Kahuakai and Maihi are entitled to the property in equal proportions; that is, Mikalemi and Kapena, heirs of Kahuakai, are entitled to one-half, and the heirs of Maihi or their grantees are also entitled to one-half, and the Court so adjudge.

The Court having announced the foregoing opinion, and before final judgment was rendered, the counsel for the plaintiffs moved the Court to amend their complaint by alleging a claim for an undivided half of the premises instead of the whole, to which the defendant's counsel assented, whereupon judgment was rendered for the plaintiffs for an undivided half of the premises.

Costs to neither party.

R. H. Stanley for plaintiffs.

Messrs. Austin & Dole for defendants.

Honolulu, April 10th, 1871.

KAPEA *et al.* vs. W. L. MOEHONUA.

IN EQUITY. BEFORE HARTWELL, J.

AUGUST, 1871.

A deed ordered to be cancelled on the ground of fraud of the grantee, it appearing that the grantor, an illiterate man, supposed the deed was a power of attorney; that relations of trust and confidence existed between the parties; and that the grantee derived an inordinate advantage from the transaction.

Prior decisions of this Court, as to rescinding conveyances, considered.

DECISION OF HARTWELL, J.

Bill in equity alleging that Antone Haalou, under whom the complainants claim, was induced by false representations to sign a pretended power of attorney, which was in fact a deed of conveyance of his lands to the respondent, now claimed by his heirs. The nature of the answer is stated in the opinion of the Court.

BY THE COURT.

It is seldom that the equity power of this Court has been invoked for the purpose of rescinding conveyances. In *Kapaakea vs. Morrison*, 2 Haw., 272, the Chancellor decreed that a conveyance be set aside on petition of the vendor, on the ground of fraud, by reason of misrepresentations made by the vendee when occupying certain confidential relations with the vendor. This decree was affirmed by the Court in banco, in June, 1862.

In *Wood vs. Stark*, 1 Haw., 9, the jury were instructed in an action of contract to recover rent due on a written lease, to find for the defendant if the lease was made and received in fraud of creditors. Like instructions were given in *Cockett vs. Hubbard*, *Ib.*, 101, on the invalidity of a deed of conveyance as against creditors. So in *Alo vs. Blair*, *Ib.*, 153. In *Williams vs. Kaea*, *Ib.*, 236, a deed of conveyance, absolute on its face, was held to have been intended as a mortgage, and a re-conveyance on payment of the debt was decreed. In *Turner's Case*, *Ib.*, 266, in probate, the Court held that an administrator must account to the intestate's heirs for the proceeds of a sale of the real estate ordered by the Court, purchased by a third party for the administrator and by him resold, on the ground that a trustee should derive no benefit from his trust.

In *Cleghorn vs. Austin*, 3 Haw., 44, an action of contract was brought to recover the value of goods mortgaged to the plaintiff by the defendants' assignor in bankruptcy. The defence that the mortgage was in fraud of rights of creditors, and executed by an illiterate person without full knowledge of its effect, was

held by the Court in banco to be good. In *Ainini vs. Kala*, ante, page 16, a conveyance of land was decreed to be void on the ground of fraud, or under advantage taken of a position of trust to drive an unfair bargain with an aged woman, and a reconveyance was ordered. These cases are all that have come before the Court, so far as I can learn, which bear on the points in the present case.

The rules which apply in this case are very plain and clear. As between the grantee and the grantor and his heir, a conveyance executed under false representations, and by mistake of its meaning and effect, is always held to be void. In addition to the decisions above referred to, the remarks of the Court in two recent English Chancery cases will serve to define the rule which must be applied when, as in this case, special advantage is obtained by one occupying a position of trust. "The jurisdiction exercised by Courts of Chancery over the dealings of persons standing in certain fiduciary relations has always been regarded as one of the most salutary description. Whenever two persons stand in such a relation, that while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage." Per Chelmsford, Ld. Ch., in *Tate vs. William-son*, 2 Ch., 61, 1866. "I take it to be a well-established principle of this Court, that persons standing in a confidential relation towards others can not entitle themselves to hold benefits which those others may have conferred upon them unless they can show to the satisfaction of the Court that the persons, by whom the benefits have been conferred, had competent and independent advice in conferring them." Per Turner, J., in *Rhodes vs. Bate*, 1 Ch., 257, 1866.

The rule, of course, applies also, that fraud is never presumed, but must be established by affirmative evidence, and that a deed *prima facie* valid can only be set aside by proof of

sufficient facts to authorize the intervention of a Court of Equity on established principles of equity.

I will recite the facts in the case which are proved by uncontradicted evidence, or are admitted, which appear to me to be in any degree material to the issue.

Antone Haalou, master of a coasting vessel trading between these islands, died intestate, in Honolulu, in April, 1869, leaving a widow, a sister, and a nephew, the complainants. He was an old friend of the respondent, and lived on terms of great intimacy with him. In 1860, August 10, the respondent executed and delivered to Antone his promissory note in the sum of \$600, payable February 10, 1861, which note has never been cancelled or re-delivered, and is now in possession of Antone's heirs. September 27, 1860, respondent executed to Antone a conveyance of certain land in Kalihi, Apana 5, Land Award No. 6450, in which a consideration of \$800 is stated in figures, the figure eight having evidently been originally a six, and changed to an eight. This conveyance is acknowledged, not recorded, and is now in the respondent's hands. Antone, by his first wife, had an interest in certain land in Manoa Valley, which, by deed of January 30, 1866, he conveyed to one Kamalula, the deed being duly acknowledged and recorded on the day of its date. It does not appear that he ever had any interest in any other land in Manoa, or elsewhere, except in a certain house lot and in a kalo lot at Honolulu. April 10, 1865, Antone executed a deed of conveyance to the respondent of the said house and kalo lots, and of the land in Kalihi described in the respondent's conveyance of September 27, 1860, in which the consideration of \$800 is expressed. This deed is signed by Antone's mark, witnessed by Thomas Brown, and acknowledged and recorded on the day of its date, and is in the respondent's possession. The Royal Patent to Akoni, No. 3602, of said house lot, is in complainant's possession, and Royal Patent, No. 658, of said kalo lot, to one Maau, with his conveyance thereof to Antone, executed in December, 1849, acknowledged by one of its witnesses after Maau's death, April

29, 1869, and recorded April 30, 1869, is in the respondent's possession. May 16, 1867, and for several weeks following, the respondent published in the *Au Okoa* newspaper, in Honolulu, a notice that he had come to be in charge of all Antone's lands, to manage, sell or lease them at his option, and calling upon all men to come before him and not before Antone. June 15, 1868, Antone gave to one Ani a lease of a portion of his house lot for one year, with privilege of renewal for six years, by indentures signed by himself and Ani. The respondent was aware that this lease was applied for, and that it was executed, and did not inform the lessee that he claimed to own the lot. The respondent owns a fish pond at Kalihikai, of which Antone had the profits for three years, placing a native in charge who paid to him its proceeds, \$200 a-year for three years, from 1860 to 1863. Antone, with his wife, wife's father and sister, lived on the house lot until his death, and some six or eight months before his death declined to sell the kalo lot on urgent request from Mr. Everett, who desired to buy, stating as a reason for not wishing to sell, that he required the land for the support of his family. He was repeatedly known to speak of the respondent as his agent, but was never heard to speak of having sold his land, except as appears in the evidence of Makalena, who drew the deed of April 10, 1865, and says he read and explained its contents to Antone, who had previously requested him to draw this deed; that he suggested that some consideration should be expressed, whereupon Antone said he owed respondent \$800 for four years' rent of the fish pond, and that after the deed was drawn, read and explained, Antone approved it. After Antone's death, his widow and sister went to see the respondent, at his request, talked with him about their shares of the property, and were told to go back and live there as before until the widow married again, when her husband must take care of her. No acts of ownership on the land were performed by respondent during Antone's lifetime, except as appear in Komo's evidence that Antone told him respondent's consent was necessary before he could execute the said lease. The only

explanation of the said notice of respondent's agency of Antone's land is in the evidence of the woman who testified that she was sent by Antone, in 1867, to ask respondent to see him about his Manoa land, and that the newspaper notice was concerning that land. The day before the deed of April 10, 1865, Antone had a talk with the respondent, at the house of the latter, in the presence of Makalena, who drew the deed, on the subject of sudden deaths, and the propriety of making their property over to each other to avoid trouble after death. Makalena is not sure that Antone felt that the respondent could sell all his land the day after this deed was made, and need not wait until after his death; he also states that he heard after the date of this deed that respondent was Antone's agent. He says he thought Antone intended a gift of his land to the respondent.

The three lots conveyed by this deed were worth as follows, viz.: The Kalihi lot, purporting to be sold by respondent to Antone in 1860 for \$800; the house lot worth \$1,000 in 1860, and \$1,500 now; the kalo lot, worth in 1865, \$750. The year after Antone's death, both the complainants and the respondent paid the taxes on these lots. The respondent, in his answer, says that his newspaper notice of agency referred to Antone's Manoa land, and was in consequence of acts of trespass committed there, greatly to Antone's annoyance; but it is not shown that Antone had any interest in land at Manoa after his conveyance of January 30, 1866, or that he ever suffered from acts of trespass on his land. The respondent, in his answer, also says that before leasing his fish-pond to Antone, he had leased it to one Keliopunui for \$200 a-year; but this same Keliopunui testifies that he never had the pond from the respondent, but was placed in its charge by Antone during the three years preceding the death of Kamehameha IV., in 1863. None of Antone's or the respondent's acquaintances ever heard either of them speak of the sale, except as already stated by Komo and Makalena. The registrar merely asks natives who acknowledge instruments, whether it is their signature, and if the paper is correct? There is no evidence that Antone ever

disagreed with his family or showed any ill-will towards them, or expressed any desire to confer a special benefit on the respondent.

On these facts, it seems clear enough to my mind that Antone never intended to convey the fee of his lands to the respondent, unless by a species of trust deed. It is not claimed that the conveyance was made from love and affection, but for a previous debt of \$800, on account of Antone's use of respondent's fish-pond; a debt not shown to be over \$600. Why should Antone, in 1865, merely to pay this debt, convey not only the Kalihi land, which respondent says he conveyed to Antone in 1860 for \$800, but other land of at least \$2,250 in value, being all the land he possessed, thereby disinheriting his heirs? It requires proof of clear reasons for such an utterly improbable and reckless course, to make it seem even probable or the act of a sane mind.

The \$800 debt is not proved, and the \$600 shown to have been received by Antone from the proceeds of the fish-pond were as likely to have been in payment of the note, as is the deed of September, 1860, executed before the note fell due, and never shown to be in Antone's hand, or to refer to land which he ever claimed to own. It seems a far more natural inference that this conveyance was not completed by delivery. If it were conveyed, why the need of re-delivery of the deed in 1865 on a re-conveyance, unless the latter transaction was a deed of trust?

The notice of agency is not explained. If trespasses were committed on Antone's land in Manoa in 1867, or if he owned any land there then, it might and ought to have been shown how. If the respondent were authorized to sell or lease Antone's land as he says he was, he knew very well, being a man of experience and intelligence, that some power of attorney was requisite to authorize him to execute leases and deeds for Antone. He shows none, however, except in the document dated April 10, 1865.

The fish-pond is not shown previously to have been leased to Keliopunui as the answer claims, and only a three years' payment of its proceeds to Antone is shown.

No explanation is better than one which is contradicted by the respondent's own witnesses, and not sustained in points susceptible of present proof. The evident alteration of figures in one of the deeds causes suspicion.

I do not think the deed of 1865 expresses the real agreement between the parties. Every fact in the case points to the conclusion that this instrument was intended and believed by Antone to be a conveyance in trust, to respondent, to secure him against real or imagined trouble, and to empower the latter to act for him. The recording of the deed is all that conflicts with this view, and that, in connection with all the facts shown, is consistent with equitable ownership remaining in Antone.

The respondent's silence about the sale, his own and Antone's assertion of an agency only, Antone's occupancy, claims and acts of ownership, the relations of trust and confidence existing between the respondent and this illiterate sailor, and the inordinate advantage derived by the respondent from the transaction, the utter failure to explain the agency notice; these are facts too significant to be winked out of sight or explained away.

I therefore decree that the respondent do deliver up, for cancelling, the deed of April 10, 1865, and that he execute a valid deed of conveyance, to the complainants, of the house lot and kalo lot in Honolulu. In regard to the Kalihi lot, there is not proof that it was actually sold and delivered. Its legal title is not disturbed, and no order concerning it is made.

A. F. Judd for complainants.

R. H. Stanley for respondents.

Honolulu, August 25, 1871.

ABELA *et al.* vs. LOUIKA *et al.*

MOTION FOR NEW TRIAL. BEFORE ALLEN, C.J.

SEPTEMBER, 1871.

It must appear affirmatively that alleged newly-discovered evidence is not cumulative, or new trial will not be granted.

Affidavits as to subornation of opposing witnesses are regarded with great caution, when introduced as ground for new trial.

New trial refused.

DECISION OF ALLEN, C.J.

This is a motion for a new trial, by the counsel for the defendants, on the ground of newly discovered evidence, and for an alleged payment by one of the plaintiffs to Keaimakani for testifying in their behalf. The action was ejectment, to recover possession of a piece of land with the buildings thereon, situated in Honolulu, and which was granted by Royal Patent to one Keoni. The plaintiffs claimed that he was the son of Kaiana, and the defendant's that he was the son of Kaahaaina; and the parties claim inheritance accordingly. It was agreed by both parties that his mother was Kaakau.

It appears that both parties introduced witnesses to prove who the father of Keoni was; the plaintiffs contending that his name was Kaiana, and the defendants that his name was Kaahaaina. The defendants now aver that they can produce additional testimony to prove that Keoni was the son of Kaahaaina, although they fail to produce the affidavits of the witnesses by whom they propose to make this proof.

From the statement of counsel, it remains uncertain whether they can obtain the testimony they seek. They say in their brief that the defendants did not succeed in procuring any affidavits at Koolau as to the paternity of Keoni, the said Kaukanaka (one of the defendants) being a stranger at Koolau. The evidence offered is merely cumulative, and it is generally easy to find some additional evidence after a trial.

It is not pretended that the discovered evidence was placed beyond the control of the defendants by means of the other party, but it is simply a neglect to procure witnesses which it is alleged will strengthen the testimony already given.

It is not apparent to the Court that there could have been surprise on the defendant, for it appears that Abela, one of the plaintiffs, was appointed administrator of the estate of Keoni, in May, 1867, and on the testimony which is declared now by the defendants to be corruptly obtained. The defendants have certainly had fair warning, and any omission or neglect to procure additional testimony in corroboration of what they have already given, is no ground for a new trial.

I regard it as unnecessary to present authorities to show that newly discovered evidence, merely cumulative, is no ground for a new trial. It must appear affirmatively that the evidence is not cumulative. Hilliard, in his valuable work on New Trials, page 381, recognizes the following authority, in relation to the multiplication of witnesses to one point: "It is said that if a new trial is granted, there are two witnesses who were not known to the defendant at the time of the destruction of the Catherine. This was the fact principally controverted at the former trial, and we are now applied to for another, because all the witnesses who knew something of the matter have not been examined." This is analogous to the case at bar. On the subject of relationship, in very many cases, there might be several trials, and yet additional witnesses could be procured who could give evidence upon the fact in controversy. Courts must adhere to settled principles, and perhaps there is none sustained by more numerous and reliable authorities than that newly discovered evidence, merely cumulative, is no ground for a new trial.

The second ground for a new trial is that one of the witnesses on the part of the plaintiffs was suborned to testify falsely. Kuaiwa files an affidavit that Keaimakani, a witness for the plaintiffs, told him that he was hired to give testimony for the plaintiffs, and was to receive \$10, and also the affidavit of

Keaumu, that Keaimakani told him that he had received \$10 for testifying for the plaintiffs.

Kaukanaka, one of the defendants, swears, as by his affidavit appears, that he heard one of the material witnesses, examined by the plaintiffs in this trial, declare in presence of himself and others, that he and another witness examined for the plaintiffs had received \$10 each from one of the plaintiffs, to induce him to give testimony to sustain the plaintiffs' allegation that Kaiana was the father of Keoni. The affidavit is very deficient in not stating who the witnesses were who made these declarations.

The affidavit of Keaimakani is introduced, in which he swears that he never said to Kaukanaka, or any one else, he had received any promised \$10 or any other sum of money to induce him to testify as he testified, and that the statement is wholly false, and that he never was promised any sum, or received any money for testifying as he did testify. Abela and Kalokalani, who, with their sister Iokapela, are the plaintiffs, file an affidavit in which they swear, in substance, that they never offered to pay money, and never did pay money, to influence any one of the witnesses to testify as they did testify at the trial, or to testify falsely.

Kauiki swears, as appears by his affidavit, that he has not met, seen, or spoken to Kaukanaka from the day of the trial to the present day, that is, the day he made oath to the affidavit, and that he has not said to him, or anyone else, that he had received \$10, or any other sum from the plaintiffs, or either of them, or from any other person on their behalf, nor has he been promised any gratuity of any kind to induce him to testify as he testified, or for any other purpose, nor has he received from the plaintiffs any money to influence his testimony. This witness and Keaimakani were the only witnesses to the paternity of Keoni introduced at the trial by the plaintiffs.

The affidavits of the parties are in direct contradiction to each other. The denial in the affidavits introduced by the plaintiffs is direct to the statements made in the affidavits of defendants and those introduced by them.

Courts regard with great caution the affidavits of this character, when introduced as a ground for a new trial; but in this case they are so fully contradicted, and by testimony as much to be relied upon as that introduced by the defendants, that the Court cannot regard them as sustaining the charge of bribery.

Motion for a new trial overruled.

A. F. Judd, for plaintiffs.

C. C. Harris & J. Montgomery, for defendants.

Honolulu, September 14, 1871.

J. I. DOWSETT *vs.* W. O. SMITH, Administrator of
A. White, deceased.

ASSUMPSIT. BEFORE HARTWELL, J.

OCTOBER TERM, 1871.

An absolute bill of sale of a vessel, although made in fraud of creditors, cannot be varied by the purchaser by parol evidence that the conveyance was merely as security for advances, the vessel having been lost after the transfer.

DECISION OF HARTWELL, J.

Jury waived. Contract to recover \$771.25 for money lent, money paid, goods sold and delivered, and money due on a promissory note, less \$249.47, the proceeds of a certain schooner alleged to belong to defendant's intestate.

Defendant pleaded in bar that the action was not brought within the statute time after rejection of the claim by the administrator, but the plea was held not to be verified, as the defendant merely informed the plaintiff as follows, viz.: "At present we decline accepting this claim. We shall use every means to do that which is just and right. Any light which you may give us on the subject will be gladly received." The plea

in bar was overruled on the ground that the rejection was not final. The defendant then filed an answer, admitting the accuracy of the items in the plaintiff's account, and claiming an offset of \$700, by conveyance of a certain schooner, by bill of sale dated, acknowledged and recorded April 8, 1870. The plaintiff denied that the sale was absolute, alleging that the schooner was conveyed merely as security for advances to be made on her, and to enable the plaintiff, from her earnings, to be paid the sum due at date of transfer.

The evidence for the plaintiff was a deposition by M. C. Monsarrat, that at the plaintiff's request he proposed to White, in April, 1870, to place his schooner, Kitty Cartwright, in the plaintiff's hands as security for certain debts, and that she might be run to the best advantage, promising to reconvey her as soon as she should have cleared off the debt; that White agreed thereto, and executed a bill of sale conveying the schooner to the plaintiff absolutely in consideration of \$700. W. R. Seal's testimony corroborates this evidence, adding that it was stated that the schooner leaked badly and needed repairs, and was already in arrears to the plaintiff, who was agent for her in Honolulu, and that this conveyance was also to protect White against his other creditors, as this was the only property he had available. The plaintiff filed certain letters by White, in which reference is made to the schooner in a way tending to show that White still regarded himself as owner.

The defendant filed the plaintiff's letters referring to the wreck of the schooner at Kauai, January 12, 1871, and to his present claim, in these words, viz.: "Allow me to tender you my sincere thanks for the interest you have taken regarding my schooner Kitty Cartwright. * * She is uninsured, and I hope may yet be saved. * * I had sold the schooner to Captain Dick, but my chance for pay is very small should she be a total loss." And again: "The sale to Captain Dick was made with a proviso, no papers were passed, and the sale would have to be confirmed by the parties interested, * * if he (Dowsett) is not the proper person to tender you thanks, who

is? The bill of sale of schooner to J. I. Dowsett was executed on the 8th day of April, 1870, and you will see by reference to the account *vs. White* that there were transactions subsequent to that date. We think that if you have the papers and accounts of White, you will find an account made out and given to Mr. White long after the transfer."

The defendant's counsel objected to the admission of parol evidence tending to contradict the terms of the bill of sale.

BY THE COURT.

The facts in the case are clear enough on the evidence above recited, and the only question is one of law.

The bill of sale was absolute, and as far as the world could know, the plaintiff was legal owner of the schooner. Had he declined to reconvey her to White when her earnings should have cleared off the debt, White could have had no remedy at law. His success in equity would have been doubtful, to say the least. He would have been referred to the maxims that he who seeks equity must do it; that no one can be relieved from the consequences of his own fraud; that conspirators in frauds against creditors cannot have the aid of the Courts to compel specific performance of immoral contracts; that Courts of Justice are not to be used as means of working injustice, making fraud easy and successful. He would have been estopped by the consideration of \$700, expressed in his deed, from showing its insufficiency unless there was such a gross inadequacy as to indicate deceit or fraud, and certainly if he did not offer to show that this sum was an unfair valuation, he would be entitled to no relief.

No one can deny that this secret parol agreement was a fraud on the other creditors. The deed of conveyance made the plaintiff legal owner of the schooner, and placed her out of the reach of other creditors, who might have insured or otherwise secured her, or obtained their share of her earnings. If a Court of Equity would refuse to allow White to show that the deed of sale was affected by a simultaneous parol agreement, how can a Court of law allow the plaintiff to do this, who was

prime mover in this transaction, at whose instance this course was taken, and who, in case of its success, would have been in a position to derive the sole benefit? The plaintiff chose to take this means to reimburse himself, to go before the world as a *bona fide* purchaser for value, but now that the vessel is lost in his hands, he seeks to show that he was not a *bona fide* purchaser. He took the chances of gain, and on him must rest the loss. The law regards him as legal owner for one purpose as well as another. It does not appear that he suggested to White's administrator before the vessel was lost that he held her in trust, or that he ever offered to account for her until her loss; on the contrary, he acted as sole owner, even assuming to sell her without notice to White's heirs.

The rules of law which forbid evidence of a parol agreement to contradict, control or vary the clear terms of a contemporaneous or subsequent written agreement, can not be relaxed in favor of the plaintiff as against the heirs of White under the circumstances of this case.

The evidence of all the transactions between the plaintiff and White shows \$71.25 still unaccounted for.

Let judgment for \$71.25 in favor of the plaintiff be entered.

A. F. Judd, for plaintiff.

S. B. Dole, for defendant.

October, 1871.

KENOA *et al.* *vs.* JOHN MEEK.

EJECTMENT. BEFORE ALLEN, C.J.

OCTOBER TERM, 1871.

History of land titles in this Kingdom reviewed.

The Mahele does not give a title; a subsequent award by the Land Commission or Minister of Interior is necessary.

A grantee under the Mahele, who failed to take proper steps to perfect his title, is barred from asserting it.

DECISION OF ALLEN, C.J.

This is an action of ejectment, brought to recover a certain Ili of land, and the plaintiff claims title by the Mahele of February 4th, 1848, and the award issued by the Minister of the Interior in 1862, under the Act of 1860, based upon said Mahele.

The defendant claims by a Royal Patent dated January 27th, 1851, to A. Bishop, and a deed from Bishop to himself of May 28th, 1851. The ancestor of plaintiffs received from His Majesty Kamehameha III. the following evidence of title as made by the Mahele.

PAHOA'S.—The one-half land Ahupuaa Kalena Island.—One-half Kalena, Ili of Waianae Ahupuaa, Waianae, Oahu. I consent to this division, it is good; Pahoa's is the one-half land mentioned above; consent is given to take it before the Land Commissioners.

(Signed)

KAMEHAMEHA (Seal).

Royal Palace, February 4, 1848.

KAMEHAMEHA'S.—The one-half Land Ahupuaa Kalena Island.—One-half Kalena, Ili of Waianae Ahupuaa, Waianae, Oahu. I consent to this division, it is good. To the King belongs the one-half land mentioned above. I have no right in it.

(Signed)

(his X mark) PAHOA (Seal).

Witness:

(Signed)

S. P. KALAMA.

Royal Palace, February 4, 1848.

A brief history of the legislation on the general subject of land titles is necessary to decide on the rights of these parties.

It appears by the Act of the 13th day of June, 1848, that His Majesty the King surrendered to his chiefs and people the greater portion of his royal domain, and placed the same in the keeping of the House of Nobles and Representatives, or such

person as they may appoint, and to be disposed of in such manner as the House of Nobles and Representatives may direct.

Certain lands were confirmed as the private lands of His Majesty Kamehameha III., to have and to hold to himself, his heirs and successors; and certain other lands were set apart as the lands of the Hawaiian Government, subject to the rights of tenants, to be disposed of by the Minister of Interior according to the provisions of law, with the approval of His Majesty in Privy Council. And the land in controversy was so set apart to be disposed of as aforesaid.

A Board of Land Commissioners was established in 1846 for the investigation and final ascertainment or rejection of all claims of private individuals, whether native or foreign, to any landed property acquired anterior to the passage of this act. The statute declared that this board shall be in existence for two years.

On the 13th of June, 1848, the Legislature extended the powers of the board for such further time as might be necessary for the examination, settlement, and award upon all such claims as may have been presented to the said board. By the Act of July 20, 1854, it is declared that the Board of Commissioners to quiet Land Titles shall be dissolved on the last day of March, 1855. An Act approved August 10th, 1854, was passed for the relief of Konohikis, the preamble of which is as follows:

"Whereas, certain Konohikis, who received lands from His Majesty at the great division of lands in the year 1848, did from accidental causes fail to present their claims to such lands to the Board of Commissioners to quiet Land Titles within the time allowed by law, and have in consequence been barred; therefore: Be it enacted by the King, the Nobles and Representatives of the Hawaiian Islands, in Legislative Council assembled: 1. That any Konohiki who received land from the King at the division of lands in the year 1848, and who failed, from any cause whatsoever, to present his claim for such land to the Board of Commissioners to quiet Land Titles previous to

the 14th day of February, A.D., 1848, may present his claim for such land to the said Board of Commissioners at any time previous to the first day of November next ensuing; and the said Board of Commissioners are hereby authorized to receive, hear, and determine all claims that may be presented to them, under the foregoing provisions, in like manner as if such claims had been presented to them previous to the 14th day of February, A.D., 1848."

An additional act was passed in 1860 for the relief of certain Konohikis whose names appear in the division of lands from Kamehameha III.

"Whereas certain Konohikis, who were entitled to lands under the division of 1848, have for certain causes failed to obtain their awards from the Land Commission within the time specified by law, and for that reason are destitute, therefore: The Minister of the Interior is hereby authorized to grant awards for their lands to all Konohikis who have failed to receive the same from the Land Commission, provided that the names of all such Konohikis appear in the Mahele Book of the year 1848; and all awards so granted by said Minister shall be equally valid with those of the Land Commission."

And by this it appears that the Konohikis had again failed to obtain their awards from the Land Commission.

It appears that laws were passed from time to time to protect this class of persons, and it is, in this instance, an unfortunate act of negligence that he failed to present his claim and secure his rights.

As appears by the certificate of His Majesty the King, he consented to the division of the Ili of Waianae, as claimed by the plaintiffs, but it was coupled with the condition that it should be taken before the Land Commission for their adjudication; Pahoa, the ancestor, failed to present his claim within the time prescribed by law, and his rights, in common with all other Konohikis, were declared by law as barred. Prior to this time, a Royal Patent was issued to A. Bishop, and the title at that time being in the Government, it passed to the grantee

therein named, and of course a subsequent conveyance would have no legal effect as against the prior grant.

The counsel for the plaintiffs contend that the Royal Patent does not vest any better legal title to the land in Pahoa and his heirs than he had before the date of the patent, as against the Government and the defendant. The land was set apart as the land of the Government by special enactment, subject to the rights of tenants, and as Pahoa's right was not confirmed by the Land Commission, the entire interest remained in the Government.

The Mahele itself does not give a title. It is a division, and of great value because, if confirmed by the Board of Land Commission, a complete title is obtained. But it was open to examination, and if the evidence was satisfactory that the Konohiki was entitled to the land according to the principles which governed that Board of Land Commission, their award gave a complete title. By the Mahele, His Majesty the King consented that Pahoa should have the land, subject to the award of the Land Commission.

It appears by the whole course of legislation that an award of the Board of Land Commission was necessary to perfect the title until, by the law of 1860, the Minister of the Interior was authorized to grant awards.

In my view, as Pahoa neglected to perfect his title before the Board of Land Commission, but suffered his claim to be barred, the legal title remained in the Government, and the Royal Patent to A. Bishop conveyed their title to him, and as it was prior to the patent issued to Pahoa, it must prevail.

Let judgment be entered with costs, for the defendant, as of the last day of the October term.

R. H. Stanley, for plaintiffs.

R. G. Davis & A. F. Judd, for defendant.

Honolulu, January 2d, 1872.

KAHINU *et al.* vs. AEA.

EJECTMENT. BEFORE WIDEMANN, J.

JANUARY TERM, 1872.

Real and personal property, as defined by Sections 483 and 484 Civil Code, must be held to be the same kind of property so designated in American, English, and Continental law.

A custom of natives in former times to remove houses does not warrant the conclusion that a house is personal property. .

DECISION OF WIDEMANN, J.

This is an action to recover an undivided two-thirds interest in a certain piece of land, and a two-story frame house thereon standing, situate on Alakea street, Honolulu, particularly described in the bill of complaint, by right of descent of the plaintiffs, Kahinu and Kikia, from Nahinu (w.), who purchased this lot in 1864, and died intestate in 1867.

The defendant claims two undivided fourths of the land as described in the complaint, and all the buildings and improvements on the whole said land as his own (personal) property.

It appeared in evidence that the plaintiffs, Kahinu and Kikia, 1; Kahalau (k.), of Lanai, 2; Kaupehe (w.), 3; and Meheula (w.), 4; are co-heirs of said Nahinu, and severally entitled to one-fourth interest in said real property; that the defendant (Aea) has purchased the interest of Kaupehe 3, and Meheula 4, therein; that the defendant has purchased from Kaaua, the surviving husband of Nahinu, all the personalty, and thus defendant is in possession of the premises since 1868. No evidence was given of rents and profits.

This is not a claim to buildings erected on another's land by permission of the owner, with an understanding that they may remain the property of the person who erected them, and subject to removal by him at his option. At the date of Kaaua's deed, in 1868, he had no title to the premises to convey, nor could he give a license for buildings erected thereon.

The building here in question is a two-story wooden building, erected during the lifetime of the said Nahinu, and is no more to be regarded as personalty because it was occupied by natives than if occupied by foreigners. To declare that a permanent structure of this kind is personal property because natives in former times frequently removed their house frame to another locality, would be to define real and personal property, not by its inherent nature, but by the views of those who held it. Such an adjudication would involve us in a changeable and contradictory system of law. The only safe way is to regard real and personal property as defined by our statutes, Sections 483 and 484 of the Civil Code, to intend and mean the same kind of property so designated in American, English, and Continental law.

Judgment is ordered for the plaintiffs for the title shown, *i.e.*, one undivided fourth in the premises claimed, with costs.

Had the defendant rested his claim upon his two undivided fourths in the real estate, costs would have gone in his favor.

S. B. Dole, for plaintiff.

A. F. Judd, for defendant.

Honolulu, 15th February, 1872.

MARIA M. CUMMINS *et al.* vs. LILIA P. WOND.

IN EQUITY. BEFORE ALLEN, C.J.

APRIL, 1872.

A wife cannot convey her lands to her husband during coverture.

DECISION OF ALLEN, C.J.

This is a petition for partition, and in answer it is alleged that Kamakee, the wife of Kamakau, conveyed to him a certain part of the Iliaina of Kewalo, by deed dated July 9th, 1865, and that he has continued in possession of the same till the

commencement of this suit, and she therefore submits that before partition can be made, the legal and equitable interest of said Kamakau in said premises should be determined.

The material question in this case, therefore, is whether a wife can make a legal conveyance of her own lands to her husband during coverture.

It is a well settled principle of the common law that a husband cannot convey lands by deed to his wife during coverture, and it is equally clear that a wife cannot convey her own lands to her husband. Neither can a wife convey her own lands to a stranger, unless her husband joins in the conveyance. Our statute is a virtual re-enactment of the common law as applicable to marital rights. The wife, in the language of the code, is deemed, for all civil purposes, merged in her husband, and civilly dead.

By the common law the husband and wife were considered as one person, and such conveyances were declared to be void. Washburn, in his treatise on Real Property, says that by the common law neither husband nor wife could convey lands to each other, nor release to each other. It is contended by the counsel for the respondent that although the conveyance would be void at common law, that was not a conclusive reason why it should not be good where the common law was not recognized as conclusive. This is a sound position, and would have application in this case unless the principles of the common law have been incorporated in our code. By the common law, if the wife was seized of an estate of inheritance in land, the husband, by the marriage, became seized of the freehold *jure uxoris*, and he takes the rents and profits during their joint lives. It will continue during their joint lives, and may continue during his life. If the wife dies before the husband, without having had issue, her heirs immediately succeed to the estate. If there is a child of the marriage, the husband takes the estate for life as tenant by curtesy, and on his death the estate goes to the wife or her heirs. Similar provisions are incorporated in the code, which provide that the husband shall,

in virtue of his marriage, have the rents and profits of all property of a fixed and immovable nature belonging to the wife unless otherwise stipulated by express contract, but if the wife shall first die, the same shall immediately descend to her heirs as if she had died sole, unless there happens to be legitimate issue of the marriage within the age of legal majority, in which case the husband shall enjoy a curtesy in said property until the said issue shall attain majority, when the property shall descend to the heirs of the body of the wife. All the authorities sustain the position that by the common law a deed of the wife of her own lands to the husband is void. These authorities should have great weight in the construction to be given to our code. Perhaps it should be regarded as conclusive, as the enactment was made, doubtless, with a full knowledge of the construction given to the provisions of the common law, not only by the English Courts, but by the American as well.

The Supreme Court in Maine sustained this doctrine until by legislation the wife was authorized to convey directly to the husband.

In the case of *Allen vs. Hooper*, 50 Maine Rep., 371, Chief Justice Appleton says: "That by the common law, the husband cannot convey by deed to the wife; he must do it by the intervention of a third person, nor can the wife convey to the husband. She is deemed *sub potestate viri*, and incapable of contracting with him. All contracts between them are void." *Martin vs. Martin*, 1 Greenl., 63. The Chief Justice then refers to the statutes which have been passed, and says "that the common law has been changed, and that henceforth the wife may deed directly to the husband."

Therefore the partition will be made without reference to the deed of Kamakee to Kamakau, which is hereby declared void.

A. F. Judd, counsel for complainants.

J. W. Austin & L. McCully, counsel for defendant.

April 23d, 1872.

ANNE LONG *et al.* vs. SARAH A. PFLUGER *et al.*

IN EQUITY. BEFORE ALLEN, C.J.

MAY, 1872.

A condition in restraint of marriage, in a trust deed, made by a husband for benefit of his wife and children, held to be void, so far as it tends to forfeit the widow's interest in the estate.

Widow's claim for dower held to be repugnant to provisions and intent of trust-deed made for her benefit, and disallowed, she having failed to elect between the deed and her dower within the statutory period.

A son by former marriage held to acquire no title under a trust-deed made for benefit of second wife and her children.

Trust-deed held to be terminated by marriage of the widow for whose benefit it was made; and the property decreed to be divided among the beneficiaries, the widow to have a life interest in one-third.

DECISION OF ALLEN, C.J.

The complainants in this bill in equity are Anne Long, wife of Thomas Long, late widow and relict of Joseph Booth, of Honolulu, and Thomas Long, her husband.

It is alleged in the bill that the said Booth was, in his lifetime, and at the time of his death, seized and entitled and in possession of divers messuages, lands and hereditaments, situated in the Island of Oahu, and that the said Joseph Booth and Anne Booth had, while living together as man and wife, to wit, on the 30th day of April, 1866, entered into an indenture, of which Joseph Booth was the party of the first part, Anne Booth, wife of said Joseph Booth, of the second part, and John Montgomery and H. A. Widemann, trustees, of the third part. It is set forth in this indenture that the said Booth was the owner of lands known as the Pauoa premises, and situated in Pauoa Valley, and which was then occupied by him as a family residence; also, that he was the owner of certain other premises, known as the National Hotel premises, situated at the corner of

Nuuanu and Hotel streets, in Honolulu, and also the owner of half a herd of cattle, then being pastured on a tract of land leased by John Booth, at Waianae, Oahu; and the said Joseph Booth being in delicate health, and finding himself no longer able to conduct and manage said property and the business of said National Hotel, has, with the consent and approval of his said wife, testified by her being a party to, and executing, an indenture of settlement, consented and agreed to convey, assign and assure to said trustees and their successors all the above recited real and personal estate, and also all the personal property on said estates; and that he did convey same to the said trustees for the purposes set forth in the said indenture; that is to say, in trust as to said Pauoa premises, for the use and occupation of said Joseph Booth and his wife Anne Booth, and their children, so long as they, or any of them, desire or find it expedient to reside thereon as a family homestead and residence; and that the said Anne Booth was to have the sole and individual control and management of the same, free from, and not subject to, the debts of said Joseph Booth, subsequently contracted by said Booth, and said Anne was to receive all the profits and rents arising from said estate, real and personal, and if there were grandchildren, they were entitled to a residence and maintenance on the said Pauoa premises. The said Anne Booth was authorized also to dispose of the cattle at Waianae from time to time, as she might deem expedient, and by this indenture it is premised that the said trustees, on the decease of the said Joseph Booth, shall convey and assign all the said Pauoa premises, with the stock and personal property thereon, to the said Anne Booth, in trust, and for the same purposes as before set forth in the said indenture, namely: as a family residence and homestead for their children and their issue.

In relation to the National Hotel premises, it is declared and agreed that the said trustees shall continue and carry on the business thereof as a hotel and retail spirit establishment, so long as the same shall continue remunerative, and take and receive all the receipts and gross proceeds of the same; they,

the said trustees, having the sole and entire control of the same in all departments, and that they shall pay and apply such receipts and proceeds in manner following, that is to say: In the first place, to pay all current expenses of the said concern, for stock, wages, and other disbursements incident to the deed of settlement, and carrying the same into effect; and in the next place, to pay to the said Anne Booth, on her own sole and separate receipt, the sum of \$200 per month for the support and maintenance of the family at Pauoa, and the education of the children of the said Joseph Booth and Anne Booth, her said sole and separate receipt to be a sufficient acquittance for such monthly payments by the said trustees; and in the next place to pay and discharge all simple contracts, debts, and liabilities now due by the said Joseph Booth; and also, all interest due and to grow due, from time to time, on a certain mortgage of the said hotel premises, for \$5000, now held by C. R. Bishop, and another mortgage of the same premises for the sum of \$4000, to James Robinson & Co.; and in the next place to apply the residue of said proceeds and receipts from said hotel to the necessary repairs, and if any surplus remains, apply the same in the liquidation and eventual payment of the amounts due on the said two above-named mortgages, with power to lease at public auction, with the written approval of Mrs. Anne Booth.

And it is further declared and agreed that when the full amount due on the said two mortgages shall have been paid, that then the said trust shall cease and determine, and that the said trustees or the survivor of them, or their successors for the time being in whom the said trust may then be vested, shall forthwith convey and assign to the said Anne Booth all the said hotel premises, with all personal and other property therein or thereto appertaining, freed and discharged of all manner of incumbrances, the same to be held by her upon trust, for herself and the children of herself and the said Joseph Booth, in the proportions following, that is to say: One-third part thereof for the use of the said Anne Booth during her natural life, provided

she shall remain unmarried; and as to the remaining two-thirds thereof, for the use and benefit of the children of the said Joseph and Anne Booth and the issue of those of them who may have died, such issue to have the share to which the parent would have been entitled to. And on the decease or marriage of the said Anne Booth, if she shall survive the said Joseph Booth, then that the one-third interest in said hotel premises, hereby given to her, shall therefrom become the property of the said children of the said Joseph Booth and Anne Booth, in like manner as last above provided as to the two-third part or share thereof.

It is alleged further, that the said Joseph Booth died on the 9th day of February, 1868; that administration was had on his estate, and that Anne Booth was appointed guardian of the persons and property of Emma Catherine Booth, Harriet Charlotte Booth, Grace Alice Booth, Clara Booth, William Booth, Ida Elizabeth Booth, Frederick Pfluger Booth, and Charles William Booth, the minor children of the said Joseph Booth and Anne Booth; that since such appointment as guardian, Harriet Charlotte Booth, one of the above minors, has deceased.

That subsequent to the decease of said Joseph Booth, said Anne Booth sold his interest in a certain herd of cattle running at Waianae, namely: an undivided moiety, and represents that the money arising therefrom was appropriated towards the payment of the then other existing debts of said estate; that said Emma Catherine Booth has now attained the years of legal majority.

That previous to the marriage of said Anne Booth to said Joseph Booth, he had been married and had issue, John Booth, who survived his father, and deceased on the 13th August, 1871, leaving a widow, Wahinealoha, and no children. That said John Booth deceased subsequently to said Harriet Charlotte Booth, and became co-heir to his said half-sister, and on the decease of said John Booth, his said wife Wahinealoha has become entitled to the interest in the said estate which said John Booth derived from his said half-sister.

That the said John Booth, in his lifetime, entered into an agreement with Hermann A. Widemann and said Anne Booth, as administrators of the estate of said Joseph Booth, to assign to them all his right, title, and interest in the estate of his late father, in consideration of receiving the sum of \$250; but that said complainants believe that said John Booth's proportion of the real estate of his father vested in himself immediately upon his father's death, and that the right of dower of his said wife, Wahinealoha, likewise vested in her, which said right has not been released, unless it shall be holden that the said deed made by said Joseph Booth on the 30th of April, 1866, divested said Joseph Booth of his estate in such a manner as to bar the inheritance of his son John Booth.

That the signature of said Anne Booth to the said deed of trust was made under great perturbation and great excitement of mind, and was not supposed or intended by her to alien or surrender any right to which she was by law entitled, and that there were no words in said instrument conveying her dower, and that the acknowledgment was not made by her in manner and form prescribed by law to release dower, nor was there any valuable consideration ensuing to her for the release of said dower.

That her signature to said deed of trust was made in the presence of her husband, as also her acknowledgment before the registrar of conveyances, under circumstances of the intensest excitement. That the words in said instrument in restraint of marriage are contrary to public policy and void, and that she is entitled, for her sole and separate use and benefit, to one-third of the rents, emoluments and profits of the said estate. And that she is entitled to receive from said trustees, after they shall have paid all current expenses of the said National Hotel, for stock, wages, and other disbursements incident to the deed of settlement and carrying the same into effect, the sum of \$200 a month for the support and maintenance and education of the said children, and that her sole and separate receipt should be a sufficient acquittance of the same, notwithstanding her marriage.

That whensoever the debts, secured by the two mortgages referred to in said deed of trust, shall be paid and satisfied, said trustees, or the survivor of them, or their successors, ought to convey and assign to her, the said Anne Long, said hotel premises and all personal and other property therein or thereto appertaining, the same to be held by her upon trust for herself and the children of herself and the said Joseph Booth; one-third for herself, and two-thirds for the children and the issue of them that may have died.

That the provision in the said deed of trust, "that upon the decease or marriage of the said Anne Booth, if she shall survive the said Joseph Booth, then that the one-third interest in said hotel premises, hereby given to her, shall therefrom become the property of said children of the said Joseph Booth and Anne Booth, in like manner as last above provided as to the two-thirds part of share thereof," is without consideration to herself for her one-third interest for her dower, to which she is by law entitled, contrary to public policy and void as towards herself.

That it is not expedient for herself and her children to reside at Pauoa, but that it is expedient to rent the said premises, and that she is entitled to have one-third of the rents received therefor set apart for her own use, using the balance for the education and maintenance of such of her children as may be in need of the same.

That the defendants, Sarah Annie Pfluger and her husband C. F. Pfluger, claim that they, together with Emma Catherine Booth, Grace Alice Booth, Clara Booth, William Booth, Ida Elizabeth Booth, Frederick Pfluger Booth, and Charles William Booth, children of said Joseph Booth and said Anne Booth, are owners of all the lands and premises aforesaid, as heirs-at-law of the said Joseph Booth, and that complainants believe them so to be owners, except so far as their half-brother John Booth, and through him, Wahinealoha, his widow, has become entitled to a share thereof, subject to complainant's right of dower therein, and her rights acquired by virtue of the aforesaid deed of trust.

That complainant Anne Booth is the guardian legally appointed of the persons and property of said minor heirs of said Joseph Booth, deceased, and that she has a right of dower in the premises aforesaid, and is desirous of obtaining an allowance thereof, and prays that a guardian *ad litem* be appointed, and that said guardian be made party respondent to the complaint.

It is satisfactorily made known to the Court that H. A. Widemann surrendered his trusteeship, and William L. Green was appointed in his place.

The material portion of the answer of C. F. Pfluger and his wife, is a submission to the Court that Mrs. Booth, now Mrs. Long, after the death of her husband, should have elected within six months whether she would avail herself of the pecuniary provision made in the trust deed, or be endowed of the land of her husband; and further, that the Court apportion the rents of the Pauoa premises between Mrs. Long and her children, individually; and that Mrs. Long is entitled only to her dower, and is not entitled to any right in the property by virtue of the deed of trust.

They also submit that Mrs. Long and the trustees should account for the receipts and disbursements of the estate. They deny that Mrs. Long is entitled to the \$200 per month from the National Hotel premises.

The guardian *ad litem* for the minors has made substantially the same answer as Mr. Pfluger and his wife have, and avers that it is immaterial whether the deed of trust was executed as alleged, or not.

The only points in the answer of the trustees which require special consideration of the Court are the submission of the question to the Court on the legal construction of the deed of trust, in this, whether they shall assign to Mrs. Long the hotel premises, after the payment of the mortgages, in trust for herself and children; and the proviso in the trust deed, which works a forfeiture of the interest of Mrs. Long in said estate in the event that she marries again; and whether the one-

third of the rents of the Pauoa premises should be set apart for the use of Mrs. Long.

In the answer of Wahinealoha, the widow of John Booth, she states that she is advised and believes that she is entitled to one-half of the share which descended to her said husband, John Booth, as heir to his said father Joseph Booth, and as heir to his half-sister Harriet Charlotte Booth, and that she claims such share accordingly, and her dower in such parts thereof as may have been disposed of by her said husband without her consent.

The first question of interest which arises in this case is this: Does the condition in the trust deed, in restraint of marriage, work a forfeiture of the complainant's interest in the hotel premises? It is stipulated in the deed of trust, that when the debts which were secured by mortgage on the hotel premises are paid, the trustees shall convey the same to Anne Booth, with the personal property thereto appertaining, and which she is to hold in trust for the benefit of herself and the children, in proportion of one-third to herself during life, providing she shall remain unmarried, and the remaining two-thirds for the children, but upon her decease or marriage, then the one-third interest in the hotel premises shall become the property of the children.

It is contended by the counsel for the complainants that this condition in respect of a marriage is void as against public policy. The authorities sustain the doctrine that conditions in general restraint of marriage are void on principles of public policy; but conditions are properly allowed in favor of such persons as may have a reasonable interest in the question of the marriage.

In the case of *Long vs. Dennis*, 4 Burrows, 2055, Lord Mansfield says that "conditions in restraint of marriage are odious, and are therefore held in the utmost rigor and strictness; they are contrary to sound policy. By the Roman law they are all void."

The Court in the case of *Lloyd vs. Lloyd*, 10 Eng. L. & E.,

139, say "that with respect to a wife, or a stranger, a testator may give an annuity to continue so long as she remains single and unmarried," and "that the law recognizes in the husband that species of interest in the widowhood of the wife as makes it lawful for him to restrain a second marriage."

A writer in the *Albany Law Journal* says very truly, that "conditions in restraint of marriage have given most trouble to our Courts, nor is the law on these questions quite yet settled."

The Supreme Court, in the case of *Parsons vs. Winslow*, 6 Mass., 169, say that "a devise to the testator's wife, of an annuity during her widowhood and life, was held to cease upon her second marriage by the testator's intention; but it was further held that such intention being *in terrorem* and against the policy of the law, as in restraint of marriage, it could not take effect, and that the wife was entitled to the annuity during her life-time, notwithstanding her second marriage, the same not being expressly devised over except to the residuary legatee, who was the heir-at-law to the testator."

Jarman, in his valuable work on Wills, says, vol. 1, page 839; "that it is impossible that the reader should receive, without some degree of jealousy, a plan for reconciling the cases (where this question is involved) where an eminent judge expressed an opinion that they were so contradictory as to justify the Court in coming to any decision it might think proper."

Redfield, second part of his work on Wills, says "that it depends wholly upon the inquiry whether the condition is reasonable in itself." He says further, "that the question as to what conditions affecting marriage are valid, must depend upon the circumstances of each particular case, and will be very materially affected by the consideration how far the condition was unfairly applicable to the relation of the parties and the peculiar views and situation of the donor and donee."

Amidst the conflict of authorities on this subject, there is no more just rule than that stated by Redfield, that the conditions which affect marriage shall depend upon the circumstances of each particular case.

In this case, as appears by the evidence, the husband had become dissipated and conducted his affairs recklessly, so that his wife became alarmed lest the estate might be ruined. In addition, she feared that he might alienate it from herself and their children, as he at times had threatened to do. In this frame of mind, she was solicitous to have the property secured from what she feared would be entire loss, and the condition is inserted in the deed of trust, that she shall lose the one-third interest for life in the hotel premises if she marries. Does not the husband attempt to exercise his control to an improper extent? By the statute she was entitled to the same interest in the hotel premises as given by trust deed, during life, and the husband had no power to defeat it. It may be said that she could have made her election and surrendered her rights under the deed of trust, and claimed her dower, but in that case, the advantages by the deed of trust, of a home for the children and more resources for the payment of the debts, and the ultimate security of the estate for the children, would have been endangered, and perhaps sacrificed.

Under the circumstances of the case, the deed of trust made a wise provision for the wife and children, and I regard this condition of forfeiture of the one-third interest in the hotel premises, in case of marriage, as void.

It is contended by the counsel on the part of the complainants, that the deed of trust was evidently intended to meet a present emergency or exigency, demanded by the peculiar circumstances of the case.

While this is admitted, it may well be asserted that its provisions were well calculated not only to secure the property from the bad management of Mr. Booth, and perhaps unwise alienation by him, but to save it for the support of the complainant and her children, and to secure the ultimate ownership of the estate, free from incumbrances, to the legal heirs. It is said that Mrs. Booth was under unnatural excitement, and therefore she should not be held to all the provisions of the deed, but virtually only for those which make for her benefit.

It must be taken together and sustained as a whole, unless there may be illegal conditions.

It is claimed by the complainants that Mrs. Long is entitled to dower in the estate, because there is no relinquishment of dower in express terms.

In the case of *Adsit vs. Adsit*, 2 Johns. Ch. 450, which the counsel has cited, and to which they have requested the especial attention of the Court, Chancellor Kent says "that the legacy is not declared by any express words in the will, to be in lieu of dower. The inquiry then is, whether such an intention in the testator is to be collected by clear and manifest implication from the provisions of the will: to enable us to declare such an implied intention, the claim of dower must be inconsistent with the will and repugnant to its dispositions, or some of them. It must, in fact, disturb or disappoint the will. This appears to be the result of a historical review of the cases upon this greatly agitated subject." There is no question of law upon which there has been a greater diversity of opinion in the Courts. At one time the doctrine was held that the wife was barred of her dower by an annuity secured upon the real estate, but this was subsequently annulled, so that the common law doctrine may be regarded as clearly stated by Chancellor Kent in the case cited, and now the question arises, is the claim for dower repugnant to the provisions of the deed of trust? There are certain purposes to be accomplished by it, namely, a homestead is reserved and an income provided for the support of the wife and children, with a reserve income, supposed to be sufficient to pay the incumbrances on the estate, so that it may ultimately be saved for their common benefit.

What is the effect upon the homestead to set apart one-third interest for her exclusive benefit? Does not this defeat the purpose of making a common home for the family?

Would it not make a divided interest between the mother and children, and perhaps render necessary an entire separation of interests between them? They have now a home with a common interest, which is wisely provided, and setting apart

one-third would be repugnant to the intent and purpose of the deed.

The dower is repugnant to the provision for the payment of \$200 per month for the common support of the family from the estate of the National Hotel premises. If the one-third of the estate is set aside, this payment cannot be made unless a very important provision for the ultimate payment of the debts is defeated.

Pauoa is set apart for a home, and the income from the hotel premises is set apart to sustain it. By the terms of the trust, it is a common property for the purpose of making a home for the wife and children; a division of the property may defeat it, and is certainly repugnant to it.

It is further provided, that when the mortgages shall be paid on the hotel premises, the trustees shall convey the same, with all the personal property, to Anne Booth, in trust for the benefit of herself and the children of herself and the said Joseph Booth, one-third part thereof being for the uses of Anne Booth during her natural life, provided she shall remain unmarried, and the remaining two-thirds for the use and benefit of their children and the issue of those who may have died, such issue to have the share to which the parent, if alive, would have been entitled. And upon the decease or marriage of the said Anne Booth, then the one-third interest in said hotel premises shall become the property of the children in like manner as the two-thirds part.

If the dower is assigned now, does it defeat the provision made for the widow of one-third interest for life in the hotel premises after the debts are paid, or is this in addition? If, besides this interest, she is to be allowed dower, there is left one-third interest for the children, all of which is in her own hands in trust. This is entirely inconsistent with the provisions of the trust. It defeats the whole purpose of a home and support for the children, and the payment of the debts, which is so important to all parties in interest.

In the case of *Allen vs. Pray*, 12 Maine, 138, the husband devised to his wife one-third part of all his real estate during

her natural life, also one-third part of his personal estate, to hold to her heirs and assigns forever.

It was contended in this action, to recover dower, that in a testamentary provision, in order to bar the right of dower, it must appear in express terms to be in lieu of dower, or so repugnant to the provisions of the will as to disturb and defeat them.

The Court say that if besides the testamentary interest of one-third, she is to be allowed dower, instead of a remainder of two-thirds for the children and grandchildren, there will remain one-third or four-ninths of his testamentary interest contributed to dower. This claim, therefore, clearly disappoints the will, and is inconsistent with it.

In the case of *Perkins vs. Little*, 1 Greenl. Rep., 135, the husband devised to his wife one-third part of his real estate, to hold during the term of her life, and after providing for the payment of his debts and certain legacies to his children, he bequeathed to her one-third part of the residue of his personal estate. In this case the party did not claim to hold under the will, and her dower also.

In the case of *Reed vs. Dickinson*, 12 Pick., 146, the Court held that under the statute, the provision made by the will, instead of being presumed to be a bounty in addition to dower, according to the English rule, will be presumed to have been given instead of dower. By the rule of the common law, Justice Morton says, "that a devise or bequest to a widow is presumed to be in addition to her dower, unless it clearly appears that it was the intention of the testator that it should be in lieu of dower. By our statute this presumption of law is reversed, and the provision in the will is deemed to be in lieu of dower, unless it plainly appears that the testator intended it to be in addition to it."

This is the construction given by the Court to a provision on the statutes of Massachusetts, which is almost in the same words as the provision in our code, which is doubtless a transcript of that of Massachusetts. This ruling is in accord-

ance with the provisions of the code, which declares that the widow shall not be entitled to both unless it plainly appears by the will to have been the intention of the testator that she should have said provision in addition to her dower. Civil Code, sec. 1312. The distinction is palpable.

The counsel for the complainants contend, that by the trust deed it must be in terms set forth that the pecuniary provision is made in lieu of dower, while the code provides that it must plainly appear that it was the intention that the widow should have the pecuniary provision in addition to her dower. The Court is clearly of opinion that not only it does not appear that it is in addition to the dower, but that it is clearly repugnant to the general purposes of the indenture.

The widow is always protected from injustice by having the election of the provision made for her, or of the endowment. A thorough examination of our code would frequently save counsel great labor in the examination of foreign authorities.

By the deed of trust, it is very clear that the whole property therein described is conveyed for the benefit of Mrs. Booth and the children of herself and Joseph Booth. It is entire alienation of the property for that purpose, and therefore John Booth, the son of a former marriage, has no interest in it. The conveyance expressly declares that the said Pauoa premises are conveyed in trust for the use and occupation of the said Joseph Booth and his wife Anne Booth and their children, as a family homestead or residence, and after the death of Joseph Booth the same property is to be conveyed by the trustees to Anne Booth in trust, as a family residence and home for herself and children. The hotel premises are conveyed in trust for the exclusive benefit of Anne Booth and the children of herself and husband, Joseph Booth, the purposes of which are fully set forth in the indenture.

This indenture excludes title in any one else save the parties therein especially named. The Court is of opinion that John Booth had no right of inheritance in the property described in said indenture, and therefore his wife Wahinealoha has no right of dower in the premises.

This I regard as the legal right of the parties, but it appears in evidence that the trustees paid the sum of \$250 to John Booth to relinquish his claim on the property, so that if there was an equity in the case, the said John Booth has had the benefit of it.

It is alleged further, that Harriet Charlotte Booth died subsequently to her father, and while John Booth, her half-brother, was living, and that she had interest in the property in common with her mother, her brothers and sisters, limited to her support in the family, at least until the debts were paid, which has not yet been done. He was equally entitled with the children of their common father, to inherit an interest in her estate. There is an equity that his widow should have her rightful portion with his brothers and sisters.

What is the proper portion of the mother who holds this estate in trust for the support of the children living with her, in view of the care and responsibility which she incurs? This will be considered when the accounts are rendered.

While she has the entire control of the whole fund, she is responsible that it be expended for the common benefit of herself and children, but when they become of age, and marry, it seems reasonable that they should have such a portion as would not injure the purposes of making a home for those who do remain.

The claim of Sarah Anne Pfluger, who is the daughter of Joseph and Anne Booth, and married, and who lives separate and apart from the family, has an equitable interest in the income which was set apart for the support of the family.

Upon the issues made, it is the opinion of the Court that the condition in the trust deed in restraint of marriage does not work a forfeiture of Mrs. Long's interest in the estate, and for this purpose is void, but the Court regards as legal and reasonable the condition in restraint of marriage which defeats the continuance of the trust, after the debts, secured by mortgage on the hotel premises, are paid, and so adjudges that the estate shall then be settled, giving Mrs. Long her one-third,

in trust, for her life, and the heirs their interests according to law. Mrs. Long had the right, under the code, within six months after the death of her husband, to make her election whether to avail herself of the pecuniary provision made to her by the trust deed, or of her right of dower. She did not avail herself of this right, and it is barred by this omission. Mrs. Long's interest, therefore, in the property, is limited to the provisions of the trust deed.

I am of opinion that John Booth had no interest as heir in the property conveyed in the trust deed at the decease of his father, and therefore his wife is not entitled to dower in the same. He had a right of heirship in the portion of the property belonging to his sister Harriet Charlotte Booth, deceased, and that his wife Wahinealoha is entitled to one-half of that interest.

The Pauoa premises were dedicated by the trust deed as a homestead, but as Mrs. Long has rented the same, she must account for the rents and profits in the same manner as for any other income; but as there is no evidence of demand having been made on Mrs. Long by the parties for their portion, and as the receipts from the trustees were to be applied for the common support of herself and children, and more especially as they had a right to avail themselves of the advantages of the common homestead, but as they did neither, it would be inequitable at this time to call for the portions to which they might have been entitled in the past.

It was the intention of the donor to make a home for his wife and children, and for the better accomplishment of this purpose, he apportioned Pauoa premises for the homestead and \$200 per month income from the hotel premises to sustain it, and that when the debts were paid, the whole estate should be conveyed to his wife to be held in trust for herself and the children, and that she should enjoy one-third, and the children two-thirds, provided she remained unmarried.

This condition does not conflict with any of the rights of the party which she possessed prior to the execution of the deed of

trust, and it is in accordance with the general spirit of the law. It is a condition that a father may reasonably make, that when the wife contracts new matrimonial relations, that she should surrender a charge which she might not execute so satisfactorily as if she remained a widow. It is a condition which the law recognizes as reasonable and just, and therefore the Court so adjudges, that when the debts secured by mortgage on the hotel premises are paid, the estate shall be divided among the children, reserving one-third interest for the use of Mrs. Long during her natural life.

As the portion of Mrs. Pfluger and Wahinealoha are small, the Court orders that an account be rendered by Mrs. Long, of the receipts of the property and their disbursement, to the Clerk of the Court, quarterly, commencing on the first day of May, 1872, and the trustees are ordered to make a full account of receipts and disbursements for the same period.

The Court will then make an equitable division to the parties in interest.

R. H. Stanley & F. H. Harris, for complainants.

Edward Preston, for defendants.

Honolulu, May 4th, 1872.

MARY BURGESS *et al.* vs. S. H. COOPER *et al.*

IN EQUITY. BEFORE ALLEN, C.J.

JULY, 1872.

A Justice of this Court, sitting in probate, approved the accounts of an administrator and distributed the estate. The heir-at-law was decedent's mother, who had died in England, leaving a will by which she devised all her interest in her son's estate to her other children, also in England. A certified copy of the will was produced in the Probate Court here, upon the proceedings in administration, but the will was not probated here, and the Probate Court remitted to the heirs under said will the amount due them, receiving their receipt in due course.

In an action by said heirs to foreclose a mortgage held by them as part of said estate, held, on demurrer, that although the proceedings in the Probate Court were irregular, yet no appeal or writ of error was taken from them, and they cannot be attacked in the present action.

DECISION OF ALLEN, C.J.

The complainants in this bill allege that they are the brothers and sisters of Edward Burgess, late of Honolulu, who died intestate on or about the 24th day of July 1870, and that by the law of this Kingdom, Mary Burgess, the mother of Edward Burgess and of the complainants, was the sole heir of said Edward Burgess; and further, that said Mary Burgess died on or about the 18th day of February, 1871, testate, and by her will she devised all her right and interest in the estate of her son Edward Burgess to the complainants in the proportions therein set forth. And it is further alleged that in due course of administration of the estate of Edward Burgess, an order of distribution of his estate was made, including four certain promissory notes of \$1000 each, executed by Steward Hamilton Cooper and secured by mortgage on real and personal estate, situate and being in Honolulu, bearing date December 28, 1869, with semi-annual interest at 10 per cent. per annum, two of which notes, amounting to \$2000 and interest, have become due, and are unpaid.

It is further alleged that William L. Green has, or claims, some interest in the mortgaged premises as one of the executors and trustees under the will of William A. Cooper, deceased, the brother of the defendant, and also as assignee of the defendant.

The complainants in their petition set forth the usual prayer for a decree of foreclosure of the mortgage of the premises conveyed by said Cooper to Edward Burgess.

The respondent Cooper makes answer to the several allegations in the bill, and among other things that he is informed and believes that the alleged will of said Mary Burgess, deceased, has not been proved before any Court of competent jurisdiction within this Kingdom, and upon this allegation,

which has been regarded in the nature of a demurrer to the bill, the argument has mainly been had.

It appears by the record of the Court that on the settlement of the administrator's accounts, an order of distribution was made, after notice to the complainants, in conformity with the will of Mary Burgess, who resided in England, and who had deceased at a date prior to the distribution. A duly authenticated copy of the will of Mary Burgess was filed in Court. This decree was made on the 18th of August last, and on the 27th of September following, a receipt was filed by these complainants, acknowledging the receipt of all the estate of Edward Burgess, deceased, in the hands of the administrator, and the order of distribution to the complainants was made absolute.

No appeal was taken to this decree nor any writ of error instituted within the period prescribed by law. The decree then is not subject to our revision in this proceeding, and it follows that the legal rights of the complainants, as awarded by the decree, must be enforced by the Court. By the decree the notes secured by the mortgage had become the property of the complainants, and of course they are the proper parties to a suit to enforce the collection.

As the decree now stands, an administrator with the will annexed could not obtain possession of the property distributed, for it has already vested. A final decree regularly obtained cannot be altered in this Court, except by the modes prescribed by law.

It is contended by the counsel for respondent that the will of Mary Burgess should have been proved and admitted to probate before it could be made the basis of any legal proceedings, and there is great force in the position of the counsel that the distribution could not be legally made to complainants as the heirs of Edward Burgess, although it was made by the interposition of the will of the mother, who was the heir of the whole property and by her devised to complainant. The defendant had notice to interpose objections to any proceedings had upon the estate of Edward Burgess, which he failed to make,

and it is not competent to make them in this suit while the decree making the distribution is in force.

It is proper for the Court to say that it does not appear that any injustice has been done, and some expense may have been saved the estate. The rights of the respondent are certainly the same in the defense of this suit as they would have been had an administrator been appointed with the will annexed of Mary Burgess, and a suit instituted by him.

This objection in the nature of a demurrer is overruled.

R. H. Stanley, for plaintiffs.

J. Montgomery & E. Preston, for defendants.

July 5, 1872.

KANAMU (w.) *vs.* W. C. PARKE, Administrator, *et al.*

IN EQUITY. BEFORE ALLEN, C.J.

AUGUST, 1872.

The Court declines to set aside a deed, and a mortgage made by the vendee, there being no sufficient proof of fraud in regard to the deed, and the mortgagee having no notice of fraud, if there had been any.

DECISION OF ALLEN, C.J.

This is a bill in equity in which the plaintiff alleges that she was induced by the fraudulent representations and by improper influences of J. L. Desha to make a conveyance to him of a certain piece of land, situated in Honolulu, and which he subsequently conveyed by a mortgage to S. B. Dole.

It is admitted that Dole received the mortgage *bona fide*, and without knowledge of the alleged fraud of his grantor, and that he paid therefor a valuable consideration, and the first question submitted to the Court is, whether the mortgage deed made and executed by Desha to said Dole is void, although the deed from complainant was fraudulently obtained by said Desha.

It is contended by the counsel for the complainant that the deed to Desha is void *ab initio*, and that no right can be derived from an act founded in actual fraud. This is true doctrine as applied to all persons who participate in the fraud. The complainant makes a deed which is acknowledged and recorded, and the respondent is a *bona fide* mortgagee of her grantee. Both of these parties are innocent of fraud; then as a matter of equity, who shall suffer? Most certainly the one who is the original cause of the loss. Had the complainant exercised a proper precaution, she need not have been deceived by Desha, and had she not conveyed to him, Dole would not have been Desha's mortgagee. If Dole incurs a loss, the complainant is the cause of it. The remedy of complainant was against Desha in his life-time, or against his estate after his death. The respondent finds a sound record title and relies upon it.

In *Beam vs. Smith*, 2 Mason, 274, Judge Story says that it has been the policy of the law since the time of Henry VI., to support *bona fide* purchasers for a valuable consideration. It is a great object of the law to afford certainty and repose to titles honestly acquired.

In the case of *Jackson vs. Walsh*, 14 Johns., 407, the Court say, "It has been a long and well settled principle that a purchaser for a valuable consideration without notice has a good title, although the purchaser of one who had obtained the conveyance by fraud."

The counsel for complainant has cited the case of *Sands vs. Codwise*, 4 Johns., 598, in which Chancellor Kent says, "On the ground of absolute fraud, the deeds were void to all intents and purposes. A fraudulent conveyance is no conveyance as against the interest intended to be defrauded. It is impossible that these deeds can be permitted to stand as a security, if they are to be adjudged bad *ab initio*. I presume there is no instance to be met with of any reimbursement or indemnity afforded by a Court of Chancery to a *particeps criminis* in a case of positive fraud." This is sound doctrine; a *particeps criminis* in fraud is not entitled to relief, and a deed

by which the parties convey with the intention to defraud is void as against creditors, as in the case of the creditors of Sands, *supra*, but in the case at bar it is admitted that the mortgagee took the conveyance *bona fide*. There was no taint upon this transaction, and this is the distinction in the cases.

Chief Justice Parker, in the case of *Somes vs. Brewer*, 2 Pick., 191, says: "There is not a single case in law or equity, where a *bona fide* purchaser has been deprived of his title by the proof of fraud practiced by his grantor upon the person of whom he purchased:" unless it be the case of *Prescott vs. Crofut*, 1 Conn. R., 527, where the doctrine was maintained that a *bona fide* purchaser without notice and for a valuable consideration, from a fraudulent grantee, had no title against the creditors of the fraudulent grantor. This doctrine was approved by Chancellor Kent, as appears by his opinion in the case of *Roberts vs. Anderson*, 3 Johns. Ch. Rep., 379. But the decree of the Chancellor was reversed in the Court of Errors, conformably to the opinion of the law judges of that state.

In the proviso of the 27th Elizabeth, there is no qualification or limitation as to the person from whom the estate is acquired, but Justice Story says that it has always been held to apply equally to estates derived from the fraudulent grantor or grantee. He says, further, that under the statute of 13th Elizabeth, the estate is not utterly void as to all persons, but voidable, and voidable by creditors only, and a *bona fide* transfer by the grantee ought to convey the estate purged of the fraud.

He says also, in case of *Bean vs. Smith*, *supra*, that a conveyance to defraud purchasers, or creditors even, is not utterly void as has been sometimes supposed; it conveys the estate effectually as between the parties and their representatives, and the estate may be maintained against all persons but those whom it was intended to defraud.

By the statute of 13th and 27th Elizabeth, fraudulent conveyance is declared utterly void as to the persons intended to be defrauded, and is limited to those persons. In this latter

statute there is a special provision, saving a conveyance made *bona fide* and upon good consideration. The same protection is extended to every mortgage made *bona fide* and without fraud or covin upon good consideration.

In the case of *Hildreth vs. Sands*, 2 Johns. Ch. 35, Chancellor Kent recognizes the doctrine that a deed fraudulent on the part of the grantor may be avoided, though the grantee be a *bona fide* purchaser, and ignorant of the fraud. The Chancellor in the subsequent case of *Roberts vs. Anderson*, 3 Johns. Ch. 378, says: "The statute in its enacting clause operates on the deed from the fraudulent debtor, and the proviso in the act applies to the original conveyance from the debtor and saves it when made to a *bona fide* purchaser for a valuable consideration. Such a conveyance is supported by the proviso, however fraudulent the intention of the grantor might be, and the contrary impression which I had once received on this point from some of the English cases, without at the time advertent to this proviso, and which led me to the dictum in *Hildreth vs. Sands*, was properly corrected by Mr. Justice Spencer when that case was before the Court of Errors. 14 Johnson, 498." Mr. Justice Spencer says that the act shall not be construed to impeach or make void any conveyance of lands made upon good consideration and *bona fide* to any person not having notice or knowledge of the covin or fraud specified in the act. The grantor may intend a fraud, but if the grantee is a fair, *bona fide*, and innocent purchaser, his title is not to be affected by the fraud of his grantor.

The terms "void" and "voidable" are often used without precision. If a deed is absolutely void, it cannot be the source of a title: if voidable only, as between the parties, it may be. The deed by the complainant to Desha, if fraudulent, was void between the parties, but voidable only, as to subsequent purchasers, or creditors, dependent upon the proof of fraud. No one should be protected in enabling his grantee to commit a fraud upon an innocent purchaser, although he may not have had guilty intention. Every man must be responsible for his

acts, and if by carelessness or a feeling of confidence in a friend he suffers himself to be deceived, it is manifest that he should suffer loss, rather than an entirely innocent person.

It is contended further, that as the complainant had continued in possession of the land, that this was sufficient notice to the party not to take a title from her grantee. But, in answer, it is said, that as a registry for deeds is established by law, where deeds may be recorded, this is a notice to the world of the state of the title.

This may be rendered inconclusive by notice to the party of a prior conveyance from the same grantor, or of a conveyance fraudulently obtained.

In the case of *Bell vs. Twilight*, 18 N. H., 164, the Court say: "It would greatly infringe upon the beneficent policy of the registry laws to charge the public with notice of any estate that a party in possession might acquire. The possession has, in fact, in such cases, no tendency to put men upon enquiry."

It is contended further, by the counsel for the plaintiff, that there is no difference in principle in the case we have been considering and that of a forged deed. But the authorities recognize the doctrine, that in the one case the deed is voidable between the parties, and in the other absolutely void. Chief Justice Parker says, in the case of *Somes vs. Brewer*, 2 Pick., 203: "The man who voluntarily signs and seals a deed, knowing its contents, though cheated into the act, may choose nevertheless to let the deed stand; and if he does until an honest purchaser, confiding in his act, and who is never apprized by him of any defect, pays his price and takes possession, all the principles of justice forbid him from avoiding the title." In the one case, the party has not executed the deed, and therefore should not be bound, and in the other, has executed the deed, and should be bound, so far as innocent parties are concerned.

The counsel further contends that when a signature is fraudulently procured to a writing under pretence that it is another and different writing, whereby the person signing the same is deceived and signs the same for such other and

different writing, the person who thus procures the signature shall be subject to the same penalty as if guilty of forgery. Penal Code, ch. 30, p. 70. I have no doubt of the correctness of this position, for in both cases the act is a felony, and no right of property can be acquired under it, for a felon can convey none. Governed by these principles, the Court will decide this case according to the evidence which may be given.

The material question which remains to be decided upon the evidence is: Did Desha fraudulently procure the signature of Kanamu to the deed in question, under the pretence that it was another and different writing, whereby she was deceived, and signed the same, for such other and different writing?

There was some testimony as to the declarations of the complainant about the disposition of her property. At one time, she said she had made a will, giving Desha all her property in consideration that he should take care of her during her life, and also of a child who was living with her. There was also testimony in relation to conversation between complainant and Desha in relation to the disposition of the property. He said she ought to make a will in his favor, as he had taken charge of her property for years, but there is no evidence that she did make a will. The evidence adduced would have had some weight, perhaps, in connection with other evidence, to set aside a conveyance as between the parties, but not to vacate a title in the hands of a *bona fide* purchaser.

The only evidence in relation to the execution of the deed was given by David Kalakaua, who swears positively that he interpreted the deed to her, clause by clause; that she perfectly understood its contents, and that she said it was all right, and then signed it. He further testifies, that Desha had charge of her affairs, and that he heard a conversation between them at one time in relation to the support or advances made by him, and he wished her to make a deed of the property, and she said she would do so.

The deed was acknowledged by Mr. Brown, the Registrar of Conveyances, at the time.

No evidence is introduced to invalidate the testimony of Kalakaua, and as he swears positively to the execution of the deed, and that she knew its contents and approved of the same, the allegation that the signature was fraudulently obtained, and that the complainant supposed that she was signing a paper for a different purpose than that expressed in the deed, is wholly disproved.

The judgment of the Court is that the bill be dismissed, each party to pay his own costs.

W. C. Jones, for plaintiff.

S. B. Dole, for defendant.

August 30, 1872.

MANINI MANUEL vs. PELANI *et al.*

EJECTMENT. BEFORE HARTWELL, J.

OCTOBER, 1872.

A deed held not to be a forgery, in an action of ejectment.

The Court is strongly of opinion (although *obiter* in this case) that evidence tending to defeat a sealed instrument is not admissible in actions at law, under our statutes.

DECISION OF HARTWELL, J.

Action to recover possession of land at Ewa, Island of Oahu, described in Royal Patent No. 125, with damages for its detention. Jury was waived by agreement. The plaintiff claims under a deed of said land from the patentee to one Paul Manini, and under a will of said Manini, specifically devising said lot to him. The plaintiff presented the will duly probated, the patent and the deed, and rested.

The defendant claims under the said patentee, one Hao, as her former husband, and on the strength of twenty years adverse possession, alleging that said deed is not genuine.

The plaintiff objected to evidence tending to defeat said deed.

By consent of counsel the evidence was admitted, subject to the ruling of the Full Court upon its admissibility in this action.

There was evidence for the defendant that Hao and those living under him occupied said land or used it since about 1849; that Hao died in 1867, intestate, and that his widow, the defendant, has since occupied; that Hao had, shortly before his death, stated that his widow and child should have the land; that the subscribing witness of the deed did not know personally the party signing the same, and had not seen him before or since; that said Hao was able to read and write, whereas the said deed shows that he merely made his mark. There was no evidence that the deed was read to said grantor, and it shows an erasure of a name below the name of the grantor. The subscribing witness, Jarrett, testified that the grantor represented himself to be Hao, but that he was not known to the witness, also that said erasure was made before the deed was executed.

There was for the plaintiff evidence that Paul Manini, the plaintiff's testator, had placed said Hao in charge of said land and of all his lands, and that Hao refused to deliver this lot to the plaintiff, saying he could have it after his death; but no definite demand for the land was shown to have been made by the plaintiff, of said Hao, nor was the time fixed when said testator placed said Hao in charge of his lands.

The deed is dated 26th July, 1849, recorded 14th February, 1868, and its execution was proved by said subscribing witness before His Honor Chief Justice Allen, 13th February, 1868. Said testator died 8th May, 1869, and his said will was admitted to probate 1st June, 1869.

BY THE COURT.

On this evidence I find no sufficient grounds to find that the deed was a forgery, but I find that it was duly signed, executed and delivered by said Hao, in whose name said patent runs, and therefore that the title so transmitted is now in the plaintiff, under the provisions of said will. Also, that the

holding and use of said land by Hao and his dependents was permissive from the date of said deed.

On this finding judgment must of course be taken by the plaintiff, but without damages, of which there is no evidence.

The plaintiff's possession of title deeds, unexplained except by a grant, has much to do with the conclusion I have reached. It seems to me also unlikely that Paul Manini conspired with one pretending to be the patentee to forge a deed on the chances that he would survive the rightful owner. For purposes of sale in such case, Paul Manini would have had to place his deed on record, which he did not do during Hao's or his own lifetime. The land at the time was of trifling value, some \$27, the same consideration being expressed in the deed as in the patent, and the land until recently was uncultivated.

With this result the admissibility of evidence in law tending to defeat a sealed instrument is not required to be decided. But I am strongly of the opinion that such evidence is not admissible in actions at law, under our statutes. To admit such evidence in common law actions would open all deeds and wills to consideration of juries, and there would then be no ground for equity jurisdiction in such matters, which exists only when legal remedies are insufficient.

The plaintiff gives notice of exceptions to the foregoing findings, and that he will bring a bill in equity to set aside said deed; this notice being intended to be used in case this judgment be pleaded in bar to said bill.

A. F. Judd, for plaintiff.

W. C. Jones, for defendants.

October 31, 1872.

WAYNE STATE UNIVERSITY
LAW LIBRARY

F. W. HUTCHISON, Minister of Interior, *vs.* STEAMER
NEBRASKA.

IN ADMIRALTY. BEFORE ALLEN, C.J.

FEBRUARY, 1873.

A steamer having been seized for clandestinely introducing a contagious disease into this Kingdom, contrary to Section 295, Civil Code; and it appearing that a passenger who landed from the steamer had the small-pox, but that it was not clearly developed, and that the captain and surgeon of the steamer had no knowledge of the passenger's illness:

Held, that if the vessel introduced the disease clandestinely, it must be through the instrumentality or neglect of its own agents; and the vessel is not liable for any secret conduct of its passengers, which reasonable vigilance could not prevent or detect.

Libel dismissed.

DECISION OF ALLEN, C.J.

This is a libel against the steamship Nebraska, in which it is alleged in the information, by Ferdinand W. Hutchison, Minister of the Interior and President of the Board of Health, that said ship arrived in this port on the 5th day of May, 1872, and that there was on board a certain passenger by the name of John Fletcher, who had been notoriously sick for the last twenty-four hours previous to his arrival, with a contagious disease known as the small-pox, and which could easily have been ascertained by proper medical inspection and examination by the master of said steamer and her officers; and it is further alleged that there were certain children sick of the same disease, yet the master of said steamer, although he knew that the said contagious disease existed on board at the time of her arrival in port, falsely signed a certificate of health; and it is further alleged that by reason of gross negligence, and false certificate of the master of said steamer, the small-pox was clandestinely introduced into this Kingdom, contrary to the 295th Section of the Civil Code, in which it is declared that any

vessel which shall be the means of clandestinely introducing into this Kingdom any contagious disease, dangerous to the public health, shall be liable to seizure, confiscation, and sale for the benefit of the public treasury.

There is a general denial of the allegations in the libel, and the issue is clearly made; and the question submitted to the Court is, was the small-pox, as alleged in the libel, clandestinely introduced here by means of the steamer Nebraska?

I am satisfied from the evidence that the passenger Fletcher had the small-pox, but that it was not clearly developed when he landed; and the question is, whether he was permitted to go ashore when the officers of the ship knew, or by reasonable diligence could have known, that he had the disease. A clandestine introduction of the disease is, with secrecy and with knowledge, or an omission to acquire the knowledge which could have been done with reasonable diligence and intelligence.

The counsel for the informant contends that the mere fact of the introduction of the disease by the Nebraska was *prima facie* evidence that it was clandestinely done, and that the burthen of proof was on respondent, and in this opinion I fully concur.

If a master gives a health certificate, it is his duty to know that there is no contagious sickness on board his vessel, and if he neglects to use the means to acquire the necessary information, it is a clandestine introduction of disease if such sick persons are landed. On this ship there is a surgeon, and the captain relies on him to keep him informed as to the health of the passengers. No better precaution can be exercised than to employ a competent medical man to attend the sick on board. This is the recognized usage on all passenger ships. The captain testified that he had no knowledge of any contagious disease on board the Nebraska on the passage referred to, and was not told so by any one.

The surgeon of the ship testified that he was acting as such on board the Nebraska on her passage from San Francisco, whence she arrived on the 5th of May last, and that he did not

know by name a passenger by the name of Captain John Fletcher. He says that if there had been anyone sick with small-pox he should have known it, and that if Fletcher was sick on board he never applied to him for advice, and that he was not aware that any passengers landed here were sick with any disease.

It appears by the testimony of Captain Briggs, a fellow-passenger, that he knew Fletcher, and that he saw him the day before the vessel arrived in port, and he said he felt very bad, and there was on his hands a kind of rash, but it could not be seen except by close observation. He says that Fletcher refused to see the doctor, and said that he could not do anything with ships' doctors; that he would wait until he got on shore. Captain Briggs says that he did not tell Fletcher what he thought the disease was; "it might have been the measles, but I thought it was the small-pox. I did not mention to anyone on board ship that I thought Captain Fletcher had the small-pox, and I heard nothing of its being epidemic in San Francisco. The Nebraska arrived Sunday morning, and Fletcher came ashore about half-an-hour after we arrived."

Captain Lambert, a fellow-passenger, testified that he saw Fletcher often during the passage, and that he was very sick with a very bad cold; that the night before arrival he saw Fletcher, and observed that his face was badly swollen, and he examined his legs and arms, and they were a dark red, and he thought it the erysipelas. He further testified that he never heard it mentioned that there was small-pox on board.

A. F. Judd, Esq., was a passenger on the Nebraska at the same time, and he testified that he knew Fletcher on board, and he was very much surprised when he heard that he (Fletcher) had the small-pox. He says he never heard the small-pox mentioned on board.

Dr. Hoffmann, who examined Fletcher the day after he came ashore, states that when he saw him he had an eruption more or less all over the body, but more particularly around the abdomen. He says: "My impression was at first that I had

seen something like this, and two diseases passed through my mind; first the idea of small-pox, as having seen something like it here in 1853, then again in regular malignant typhus in Europe, but it seemed to me strange that wherever I saw this round the abdomen it was much more malignant in the face in those cases I saw before. The nose, face and mouth were the worst, which was not so here. Again, whenever I saw patients in that condition they were prostrated or delirious, and again in typhus the same—entirely prostrated. I then examined him and asked the history of this case, and he told me he had been sick ever since he left Chicago with cold and rheumatism, and had been travelling without accommodation; he also said he had had scurvy at some time or other. After that the case became more obscure to me, as the marks led me to think the man had a disease produced by want of proper food, or exposure generally, and this with the former severe scurvy made me think perhaps that the man might not have the small-pox, but a disease produced by his blood being in a bad state, at the same time I could not make it out exactly. I thought it might be small-pox, or not, but certainly not the regular form of small-pox."

Dr. Hutchison testified that he went in company with Dr. Hoffmann to Fletcher's room to examine him, and after examination, was of opinion that it was not the small-pox, from the history of the case as made by Fletcher himself.

Dr. McKibbin, after examination of the case, and hearing from Fletcher a history of the state of his health since the time he left the Eastern States, was of the same opinion.

Dr. McGrew was of opinion that Fletcher had the small-pox from his first examination of his case, although a cold affecting the lungs retarded its development. The doctor says that he died of congestion of the lungs, and not of small-pox. Without the cold the small-pox would have run its regular course. "I should judge that he had had it two or three days. If I had seen him two or three days before, I could not have said what it was."

It is very evident that he declined to consult the attending physician of the steamer, and that the account he gave of himself and of the state of his health was calculated to mislead and did mislead several accomplished physicians in relation to the character of his disease, who examined him the day after he came on shore. From the foregoing evidence it is not strange that there should not have been a knowledge of the disease by those on board.

The counsel for the libellant contends that this is a case analogous to that of a violation of the revenue laws. This would be a sound position if the code did not make a palpable distinction. In the one case it declares that a vessel shall be liable to forfeiture, if by its means there shall be a clandestine introduction of a contagious disease, or any disease dangerous to the public health; and in the other, a landing of foreign goods from a foreign vessel, or Hawaiian vessel from a foreign port, at any other port than a port of entry, will make a forfeiture.

The very act of landing the goods, by the express tenor of the law, makes a forfeiture. The omission to place on the inward manifest a list of goods makes the goods liable to confiscation, although in this case the errors may be remedied when it shall be made to appear that there was no wrong intention or gross negligence. The landing of a passenger, although sick with a contagious disease, if not developed, may be explained; but the proof is on the defense to show that there was not a clandestine introduction of the disease, and that there was reasonable care in the examination of the vessel and the passengers on board.

The disease with which the passenger Fletcher was afflicted was doubtless more developed when this examination took place by the physicians in port, than when he left the vessel the day before, and it is not surprising that it should have been called rash or erysipelas by those on board. There was no suspicion of small-pox among the passengers, except in the mind of Captain Briggs, and he did not make it known to the physician or any one else on board, as it was his duty to have done. It is very

evident that it was not known by the officers of the ship that Fletcher was afflicted with small-pox when he landed here, and therefore there could not have been a clandestine introduction of the disease.

The next question, and a far more difficult one to decide, is this: Was there such effort to ascertain the state of health of the passengers as would probably have created a suspicion that a contagious disease was on board? Generally, when a person is sick, the physician's attendance and advice is solicited. In this case, however, it is evident that there was a determination in the mind of Fletcher not to call on the steamer's physician. He seems to have less confidence in the physicians who are employed on passenger vessels than in the regular physicians in port, and hence from him the physician on board the steamer received no knowledge of his case, or from anyone else, or a suspicion that he was laboring under any disease. There was nothing to excite his suspicion that the small-pox was on board. He testifies that he daily visited and examined the passengers; that he was not aware of anyone having small-pox; that he did not know Fletcher, and that no request was made to him to visit and administer to him. It is in evidence also that there was daily examination of all parts of the vessel, and it is not pretended that there was any negligence on the part of the physician in attending upon passengers when called upon. This is all the precaution which is usually exercised on passenger ships, and it is generally sufficient, and would have been in this case had Mr. Fletcher exercised the prudence which most persons do when sick, of consulting the physician on board.

It is very evident either that Fletcher did not know his true condition, or he had a singular disinclination to make it known, as was illustrated by his account of himself to the physicians on shore. Had the physician's attention been called to him, it being the day before Drs. Hutchison, Hoffmann and McKibbin examined him, it is very probable that he would not have called it small-pox, still I should have been of opinion that it would have been the duty of the physician to have reported the case to

the captain, and his duty to inform the authorities before permitting him to land, that he was afflicted with a disease that might be contagious, and on failure to do this, it would have been a clandestine introduction of the disease, if it proved contagious. But in this case, knowledge of the disease is not traced to the master or the physician, and a reasonable diligence on their part is proved. Had Fletcher made known his case to the physician, although the nature of the disease might have been obscure, still it was of that character that should have created an apprehension that it was a contagious disease, and my opinion upon that state of facts would have been that a reasonable precaution had not been exercised, as it would have been their duty to have prevented his landing until at least the authorities had opportunity to have examined the case, and made a decision of the proper course to take to protect the public health.

The counsel for the libellant very properly asserts that the Legislative Assembly had a right to pass laws to preserve the public health by preventing the introduction of disease either by fraud, accident, negligence or mistake, and the question in this case is, have they passed a law having this power? Had the language of the law been that any vessel which shall be the means, in any way whatever, of introducing into this Kingdom any contagious disease, shall be liable to seizure, confiscation and sale, the position of the counsel would have been sound; but I am of opinion that the word clandestine was purposely inserted to protect vessels from forfeiture by the fraud, negligence, or peculiarities of passengers. It would not be difficult for one afflicted with a contagious disease to conceal it on the passage, as it appears in this very case, and to make a forfeiture of the vessel should only be done by clear and express terms of the law. Was the vessel the means of clandestinely introducing the disease? I hold that there is a material distinction between the vessel and its passengers. If the vessel introduced it clandestinely, it must be through the instrumentality of its own agents, or by their negligence; but the vessel is not liable, by

any rule of construction of this law, for any secret conduct of its passengers which reasonable vigilance could not prevent or detect. It would be dangerous to vessels to be subjected to a more rigid law than our own, under the construction which I have given it, and which, as it seems to me, is the only one of which it is susceptible. Laws are not made to repress commerce and navigation, but to regulate intercourse between nations, and it would be a rare instance that a vessel could escape responsibility under the construction which I have given. Persons who are ill usually make it known, and call on the physician of the ship. It causes no expense to the party. Had there been no physician in the service of the Nebraska, and whose duty it would have been to attend to all cases of illness, I should have been of opinion that the vessel would have been liable, for want of proper attention to the condition of the passengers, and a probable want of knowledge. But in view of that service, in the discharge of which there is no evidence of negligence or inattention, and in view of the fact that the nature of Fletcher's disease when he went on shore was so obscure as not to excite any suspicion or comment among the passengers, and to baffle the judgment of eminent physicians on shore, and also from the fact either of a studious effort to conceal the character of his illness, or a strange disinclination to consult the physician attached to the steamer, I am clearly of opinion that there was no clandestine introduction of the disease, as alleged in the libel; and therefore I adjudge the same to be dismissed, each party paying costs.

W. C. Jones, for libellant.

C. C. & F. H. Harris, for respondents.

February 28, 1873.

L. McCULLY, Administrator of William Fetters, deceased,
vs. W. H. HUDDY, *et al.*

IN EQUITY. BEFORE ALLEN, C.J.

JUNE, 1873.

Defendant, being indebted to plaintiff's intestate on a note, conveyed his property to his wife; when the note became due, defendant gave a new note for the same amount, with interest.

Held, that the deed was void as against the second note: the latter being a renewal, and not payment, of the first note.

DECISION OF ALLEN, C.J.

This is a bill in equity in which the complainant alleges that the said William Fetters was a resident of Honolulu in August, 1869, and that William H. Huddy, then and still a resident of Honolulu, was indebted to him in the sum of \$400, and gave him his promissory note for the same on the 13th day of August, same year, payable to his order in twelve months, with interest, and that failing to pay the same, he renewed the note on the 13th day of August, 1870, adding interest, making the amount \$448, payable in twelve months, with interest, and that said Huddy has also failed to pay the said last described note.

The complainant further avers that said Fetters died in Philadelphia, and made and published his last will and testament, bearing date of August 29th, 1870, which was duly proved, one J. G. Rosengarten being named as executor, and who procured the probate thereof, and that subsequently, to wit on the 9th of December, 1871, said Rosengarten having failed to procure payment of the said debt, or any part thereof, obtained the judgment of the Supreme Court of this Kingdom for the sum of \$502.25, being the amount due on said promissory note, principal and interest and costs; and the complainant further alleges that he was duly appointed administrator with the will annexed, on the 22d day of March, 1873.

And the complainant further alleges that said Huddy being

possessed and entitled of several parcels of real estate situate in Kalihi, Island of Oahu, and known as Keonepame and Puuwaa-kuku, and conveyed to him by two deeds dated 24th of February, 1866, and 14th of February, 1867, more particularly described therein, conveyed the same on the 28th day of April, 1870, in consideration of love and affection to his wife, Kahea Huddy, for her life, and to his children Mary Ann, Lydia C., and George H. Huddy, and any other children which might be born unto him thereafter; that no valuable consideration was paid for the same, and that it was purely a voluntary conveyance, and that the same ought not to prevail against the lawful claims of the complainant which accrued before and existed at the time of the execution of said deed, and that the same is in fraud of the rights of the complainant in the premises, and ought to be declared void as against said judgment.

Attorney-General A. F. Judd was appointed guardian *ad litem* of the children heretofore named, and made answer that the several allegations in the bill were true, and William H. Huddy and Kahea Huddy by their answer admit all the allegations of the bill, but submit to the judgment of the Court whether said promissory note of William H. Huddy in favor of said William Fetters, bearing date the 13th day of August, 1870, being subsequent to execution of said deed of conveyance, to wit, on the 25th of April, 1870, was in law a prior lien upon the real estate conveyed, and whether the deed of conveyance, made prior to the date of the note on which judgment was obtained, ought to be decreed null and void.

It is admitted that the conveyance was voluntary and without consideration, and was made when he was indebted for the note given in August, 1869, but that the same was renewed in August, 1870, subsequent to date of deed.

From the facts admitted and proven, it is very clear that the conveyance was in fraud of creditors, of which Fetters was one.

What effect did the renewal have on the rights of the parties?

I am of opinion that it was not an extinguishment of the debt,

but merely a cancelling of the former note. The deed being fraudulent when made as against the complainant's intestate, will continue so till his indebtedness then existing is discharged. It is admitted by the answer that the first note was not paid.

In the case of *Pomroy vs. Rice*, 16 Pick., 22, the Court declared it a well settled principle that when a mortgage and note are given to secure the payment of a sum of money, the renewal of the note does not operate as a discharge of the mortgage.

The same principle was recognized in *Davis vs. Mayard*, 9 Mass., 242.

Watkins vs. Hill, 8 Pick., 522, was decided on the ground that the note was a mere renewal and not intended as payment of the debt.

It is admitted that the last note was a renewal of the first, and there is no pretence that it was in payment.

It may be well to remark that in the case of *Cummins vs. Wond*, ante page 69, the Court decided that the husband could not legally convey lands by deed to his wife during coverture, and the deed in that case was declared void.

By that decision the deed in question would be void so far as the interest of the wife is concerned, were it not void on the ground already stated.

The deed referred to in the pleadings is hereby declared void and judgment is given for the complainants without costs to the minors.

L. McCully, for complainants, and *A. F. Judd*, guardian *ad litem*, for minors.

W. H. Huddy, in person.

June 5, 1873.

In re KELIPIO, an Attorney-at-Law.

MALPRACTICE. BEFORE HARTWELL, J.

JULY TERM, 1873.

An attorney punished for obtaining a fee for work he had neglected to perform.

DECISION OF HARTWELL, J.

On information by the Attorney-General.

The respondent is complained of on a charge of malpractice and gross misconduct in having negotiated a lease of certain land from one Kaili, and Kaula, his wife, to the firm of Campbell and Turton, under false pretences as to the title, knowing the same to be in one Mailou, from whom he negotiated a subsequent lease of a portion of said land to other parties; also, besides a fee of \$40 for said lease, for taking a fee of \$50 from said Kaili and Kaula under pretence of obtaining an order of Court to set aside a certain conveyance of the said second portion of land to said Mailou. The information charges that the false pretences aforesaid were practiced on aged and ignorant natives, to induce them to part with said \$90. The respondent's counsel demurred to the information as showing no case sufficient in law, but the demurrer was overruled.

BY THE COURT.

I am not sure on the evidence that the respondent is guilty of gross misconduct towards Campbell and Turton; but that he misled the natives Kaili and Kaula by persuading them to pay him \$50 for work he had not undertaken to perform, although about one year has since elapsed, is clear enough.

The respondent undertaking to refund the said \$50 to the said Kaili and Kaula, he is fined \$1 and costs.

C. C. Harris & R. H. Stanley, for respondent.

Honolulu, July 23, 1873.

In re KEAWEHUNAHALA, an Attorney-at-Law.

MALPRACTICE. BEFORE HARTWELL, J.

JULY TERM, 1873.

An attorney punished for neglecting to appear in a case after he had been retained; and for appropriating the whole of an amount collected by him for a client.

DECISION OF HARTWELL, J.

On information by the Attorney-General.

The respondent is complained of for malpractice and gross misconduct, on two counts. The first count charges that he undertook a probate matter for one Kahema, agreeing to do the work for \$16.10, including costs of Court; but that, after a hearing was ordered by the Court, he neglected and refused to appear further in the matter unless \$20 more were paid him; and that, by his negligence and refusal, the said Kahema was obliged to employ other counsel. The second count charges that he agreed to collect for one Kanehoalani \$50, appropriated to him by the Legislature, for one-half that amount as commissions or pay for his services in obtaining the appropriation and collecting; that he collected and retained the same, refusing and neglecting to pay any part thereof to the said Kanehoalani.

The respondent answers that he did undertake the said probate matter, but on the agreement that he should have \$20 for his fees, and that \$10 of the sum paid him should be for costs of Court. It is shown that \$10 were paid by him to the Clerk of the Court in filing the probate petition. He claims that he had a right to refuse to go on with the case until the rest of the sum agreed should be paid. In the second case, the respondent answers that the said Kanehoalani was indebted to him \$100 for legal services, and that he obtained the appropriation in Kanehoalani's name, but under an agreement that it should go to paying said debt. There was no evidence in the first case, but

in the second the evidence of Kanehoalani himself was, that the respondent was to have but half of the \$50, as stated in the complaint.

BY THE COURT.

On the first charge, by the respondent's own statement, I think he did wrong in undertaking a case, obtaining an order for a hearing, and neglecting to appear before the Court at the time set by a published order, when parties and witnesses were thereby brought to Court. If he had not received enough retainer, that was reason for not commencing, but not for breaking off in the case in this way.

In the second case, there is the usual difficulty of deciding between client and counsel, whose transactions are private, each testifying for himself. But I do not think the appropriation would have been likely to be made if the respondent had shown that it was for his sole benefit. It seems to me that on his own showing he has not done that which a member of this bar should do, in keeping clear of any imputation or hint of want of professional integrity. The respondent has not to my knowledge been known to be guilty of the system of cheating unfortunately so often charged against counsel. But when I am sure that there has been professional misconduct by any member of this bar, and it is properly shown, I intend to make such example as may show that the Court will lend its sanction to no attorney-at-law who deviates from the strict course of rectitude.

The respondent is reprimanded for his conduct in each of these cases, and is fined \$5 and costs.

Respondent *pro se*.

Honolulu, July 25, 1873.

H. HACKFELD *et al.* vs. J. K. AKINA.

IN EQUITY. BEFORE HARTWELL, J.

SEPTEMBER, 1873.

A parol assignment of a mortgage of real estate, accompanied with endorsement of mortgage note and delivery of mortgage deed, is valid under our statutes.

DECISION OF HARTWELL, J.

Bill for foreclosure of a mortgage of real estate. The mortgagee endorsed the mortgage note to the complainants, and delivered to them the mortgage deed as security, but without a written assignment. The respondent demurs on the ground that the mortgage can only be assigned by a written instrument, citing the following sections of the Civil Code, viz:

Section 422, which provides for stamping "all documents requiring to be stamped, that is to say, all deeds, mortgages, leases and other conveyances of real estate."

Section 424: "No document required to be stamped as in Section 422 shall be recorded or be of any validity in any Court of this Kingdom unless the same shall be duly stamped."

Section 1053: "No action shall be brought or maintained upon any contract for the sale of lands, tenements or hereditaments, or of any interest in or concerning them, unless the promise, contract or agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing, and be signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized."

Section 1262: "All deeds, leases for a term of more than one year, or other conveyance of real estate within this Kingdom, shall be recorded in the office of the Registrar of Conveyances, and every such conveyance not so recorded shall be void as against any subsequent purchaser in good faith and for a valuable consideration, not having actual notice of such con-

veyance of the same real estate or any portion thereof, whose conveyance shall be first duly recorded.”

BY THE COURT.

I do not think a parol assignment of a mortgage of real estate, accompanied with endorsement of the mortgage note and delivery of the mortgage deed, is invalid by any provision in our statutes.

The conveyances requiring to be stamped and recorded in order to their validity are, of course, written instruments; but I know no statute which declares that no interest in land shall be created by livery and seisin, or by parol only, except as against *bona fide* purchasers for value and without notice.

Our code substantially enacts the 4th and 17th Sections of the Statute, 29 Car. II., Cap. 3, omitting to enact those sections which declare that certain interests in land shall be created by deed only, and shall have the effect of estates at will if made by parol, and that certain interests in land shall not be “assigned, granted, or surrendered, unless it be by deed or note in writing.” There is also no enactment of an exception in regard to resulting trusts made by the English Statute.

In this case there is a recorded mortgage duly signed by the party sought to be charged, and that is all that is required as between these parties, as we have no statute which precludes the assignee of a mortgage from bringing a bill for foreclosure in his own name.

In reaching this conclusion I have not been embarrassed by questions raised under English and American statutes.

The Massachusetts Statute, for instance, enacts that “no interests in lands shall be assigned, granted, or surrendered, unless by a writing signed as aforesaid, or by the operation of law.” I should find it difficult to avoid the construction placed on such a statute by the Massachusetts Courts, which require the assignment of a mortgage to be made in writing in order to base a real action for foreclosure. Such is the judicial view in Maine, New Jersey, Pennsylvania, Indiana, Alabama and Maryland, although it is otherwise in most of the States.

Young vs. Miller, 6 Gray, 153; 2 Washburn's Real Prop. (edition 1868), 113, and notes; Browne's Statute of Frauds, 66, and notes. But in the former strict construction the assignees of a mortgage assigned by parol can secure their rights in equity by making the assignor a trustee for their benefit. Undeniably there is public policy in the Statute of Frauds, which gives means of public information concerning land titles. In my opinion the same policy would require the assignment and discharge of mortgages to be made matter of record, but that policy is not yet made law.

The case suggests the need of legislation on our law of real estate.

C. C. Harris, for plaintiffs.

W. C. Jones, for defendant.

September 3, 1873.

E. P. ADAMS *vs.* BISHOP & CO.

IN EQUITY. BEFORE HARRIS, J.

AUGUST, 1874.

The firm of Walker & Allen made a voluntary assignment to plaintiff for benefit of creditors, which was recorded at 2 P. M.; at 6 A. M. on the same day the firm had transferred to defendants certain sugar on board a steamer in port, as per an agreement made several days before, by which defendants, as bankers, allowed said firm to draw \$3,300, to be paid in sugar upon the next arrival of the steamer from the sugar plantation:

Held, the transfer of the sugar was not void and in fraud of creditors, it being made in good faith, and defendants not being certain that Walker & Allen were insolvent.

The provisions of our Bankruptcy Statutes, and the theory of the laws of other countries as to voluntary assignments, held not to apply to voluntary assignments in this Kingdom.

The bill in this case alleges in substance as follows: That the firm of Walker & Allen, of Honolulu, being insolvent on

the 8th day of June of this present year, made a general assignment to the plaintiff, for the benefit of creditors; that on the 25th day of September, 1872, the said Walker & Allen had entered into an agreement with Messrs. Welsh & Co., of San Francisco, and Messrs. Welsh, Rithet & Co., of Victoria, to consign to them all the sugars of the plantations of which they were agents, for advances made and to be made; and they further aver that at the date of the assignment aforesaid the agreement with Messrs. Welsh & Co. was in full force and effect.

The bill further avers that at the time of the agreement with Messrs. Welsh & Co., and at all times thereafter up to the date of the assignment by Messrs. Walker & Allen to the plaintiff, Messrs. Walker & Allen were agents for Thomas Spencer, sugar planter at Hilo, Island of Hawaii, who at the date of the said assignment was largely indebted to Messrs. Walker & Allen for advances made to carry on his plantation, and was himself insolvent; and during all this time T. Spencer was under arrangement to consign to Messrs. Walker & Allen all the produce of his plantation in consideration of their loans and advances.

The bill further avers that at the time of the assignment the firm of Walker & Allen was indebted to the defendant in the sum of \$3068.04; and on the 7th day of June that the said Walker & Allen delivered to the defendant a paper writing, order or receipt for certain sugars, the product of Spencer's plantation, which had arrived that day (Sunday) per steamer Kilauea; and at 6 o'clock in the morning, on Monday, 8th of June, Walker & Allen caused an entry to be made in their books purporting to show a sale of these sugars to the defendant for \$3701.15; and further the defendant though requested has refused to deliver over any portion of the sugar or proceeds, except the sum of \$633, which was the value of the sugar delivered to him over and above the sum of \$3701.15 before mentioned. The bill further avers that the defendants are bankers, and the purchase and sale of sugar is not within their

ordinary business, and on the 7th day of June aforesaid they were acquainted with the agreements with Welsh & Co., and Welsh, Rithet & Co., with the insolvency of Walker & Allen as well as T. Spencer, and that the sugar was from Spencer's plantation; that Walker & Allen were about to assign; and it is further averred that the price at which the sugar was quitted to the defendant by Walker & Allen was very inadequate, and it is submitted that such transfer and taking possession of the sugar was in fraud of the rights of the general creditors of Walker & Allen, and void as against said creditors, or was a means of securing the defendants in the payment of a loan or advance of money made to Walker & Allen, and therefore in fraud of the rights of general creditors and void as against them. The defendants in their answer deny any knowledge of insolvency of Walker & Allen, although they admit they knew that they were indebted to many other persons. They say they have no knowledge whether or not the agreement of Walker & Allen with Welsh & Co. was in force at the time of the agreement, and submit that the insolvency of Spencer could not affect them, the defendants; they deny that Walker & Allen were indebted to them (defendants) at the time of the assignment; say that the sugar was delivered to them as charged in the bill, and though they are not accustomed to buy sugar, they have done so from the firm of Walker & Allen, and did purchase this sugar in good faith, and admit that they refused to surrender the same; aver that they took and retained possession of the sugar by virtue of two contracts dated the 1st day and 3d day of June last, which contracts read as follows:

"Honolulu, June 1st, 1874.

"We have received from Messrs. Bishop & Co., permission to check upon them for cash to the amount of \$2500, in payment for sugar this day sold to them for an equal amount at the following valuation:

"Viz: No. 1 sugar, in kegs, at $4\frac{1}{2}$ cents per pound; No. 2 sugar, in mats, 3 cents per pound, to be delivered to them on the return of the steamer Kilauea from Hawaii, within ten

days from this date. The sugar is now made and in possession of Thomas Spencer, in Hilo, Hawaii.

“(Signed)

WALKER & ALLEN.”

“In addition to the above amount we have received from Messrs. Bishop & Co., the sum of \$800, which amount to be paid in sugars as above.

“(Signed)

WALKER & ALLEN.

“Honolulu, June 3d, 1874.”

It does not appear to me that the lowness of the price at which this sugar is quitted is such as to give any coloring to the transaction, one way or the other. The price was 3,700 pounds of No. 1 sugar at $4\frac{1}{2}$ cents, and 5,400 pounds of an inferior quality at 3 cents. Mr. P. C. Jones says that on the first of June such sugar as the best was worth cash at 5 cents, and he would have given it himself. But it is said that the sugar was not to be delivered until the 8th; an opportunity for shipment immediately frequently has great influence on the price.

Mr. E. P. Adams, the plaintiff, says, that in his capacity as a commission merchant he offered the same sugar on behalf of Bishop & Co. to several, and among them Mr. Jones' firm (Messrs. Brewer & Co.), eight days afterwards, and that the best price he could get was $4\frac{3}{4}$ for the first sugar, and $3\frac{3}{4}$ for the second, which he obtained from Messrs. H. Hackfeld & Co.; thus showing a difference of only a quarter of a cent on the largest and most important part of the sugar under contemplation. This surely is not such a disparity as of itself to give a fraudulent color to the transaction. Mr. Allen in his testimony says, that the transaction was in good faith, and that he did not give Mr. Bishop to understand that he was insolvent, though he told him that he was “hard up,” that is to say, much pressed for money, but was intending to keep his concern going as long as he could.

The agreement with Welsh & Co., and Welsh, Rithet & Co., offered in evidence by the plaintiff, contains nothing of itself to give any notice that they had any claim on the sugar in ques-

tion. It is dated 25th of September, 1872, and recites that Messrs. Walker & Allen have the control of the products of certain plantations, and among them of Spencer's "during the years 1872 and 1873;" and again, "This agreement shall be in force for one year, and until the provisions thereof are fully complied with, and may be continued by consent for a longer period." Mr. Allen says that at the time of the assignment of his firm, they were under contract to ship sugar as in this agreement set forth, but surely there is nothing in the contract itself to give notice to anyone that it had not expired with the year 1873. But suppose the agreement to be in full force—as Mr. Allen says it was,—and that the defendant knew it—which he says he did not,—it is difficult to see how it would help the present plaintiff, who acts for the general creditors. It would simply amount to an agreement with Welsh & Co. to ship the sugar to them to pay their debt, and would not insure the delivery to the general creditors.

It was said at bar in behalf of plaintiff, that it could not be assumed by the Court that the delivery occurred before the assignment, since they both occurred on the same day.

But the whole proof goes to show that the delivery was made first, and the assignment afterwards; as the deed of assignment was not put in evidence, I have had recurrence to the public record, and I find that it was acknowledged 23d June at 2 o'clock p.m. I regard the sale to have been complete on the 3d of June, and the weight of authority goes to that effect. Spencer had written to his agents that he had the sugar ready to send to them; they (his agents) sold it and got the money for it on that day, and Spencer shipped it according to the understanding. The title in this sugar was then passed by a good and valid bargain, which in my opinion would have enabled the defendant, under all the circumstances, to maintain an action against Spencer if he had attempted to withhold delivery. At any rate, Spencer's agents did deliver it, and the money went to Spencer's benefit.

Thus it will be seen that the money was not advanced on

security, and to declare this sale void "would place this defendant in a worse condition than any other *bona fide* creditor," since on the day of the sale he was not a creditor at all, and did not intend to become one.

Again, the sugar was in Spencer's possession, and if he had failed to ship it the respondent could have got it.

If the respondent took possession of the whole invoice, it was because he was told to do so, and he was bound to restore only that which exceeded the quantity which he had purchased, and this he has done. Nor do I see any peculiarity in the business conference on Sunday; the vessel had arrived on Sunday morning with the sugar on board, and would commence discharging early Monday morning, and it would be necessary for someone to be on the wharf to take account of it.

If there was a bill of lading or clerk's receipt which seemed to require to be endorsed, it was but natural it should be done at that moment, so that it might be ready to be acted upon early in the morning. The entry in the book had nothing to do with the defendant, who did not know and may be supposed not to have cared whether they entered it in their books or not. The entry may be presumed to have been made at the convenience of the book-keeper, and to keep the account straight between them and Spencer.

If the Court should hold differently than this, it would follow that every sale made by Messrs. Walker & Allen during the few weeks preceding their assignment would be void—even though made for cash—and purchasers would be obliged to pay for their goods over again. There is no statute in this Kingdom which takes from a person the right to convey a good and valid title to his property, except the Bankrupt Act, Section 978 of the Civil Code, and if persons want to avail themselves of the provisions of that act they must take proceedings under it, and the question would be whether the consideration was *bona fide*—which it was in this case—and whether the defendant had positive notice of insolvency or bankruptcy, which does not mean a suspicion arising from a conviction that the business is

not prosperous, but a notice, a certainty, or a reasonable certainty that a man is bankrupt, so that his act tends to defraud his creditors, or some of them. The reasons which have induced the enactment of statutes of other communities to regulate and control voluntary assignments have never had any existence here, and the reasoning based upon those statutes is entirely inapplicable in this country. Here, the assignee can get no more rights than the assignor had at the time of his assignment; whence it would follow that if the goods in question had been the property of Walker & Allen, instead of Spencer's, their assignee could not have recovered them, because they were paid for and delivered before the assignment. If the creditors were not contented with the condition of the estate, it was in their power, or the power of any one of them, not to accept the assignment, and to take measures to put in force the provisions of the Bankrupt Act as against the insolvent firm.

I take notice of the difference of phraseology in the receipt dated 1st of June, and that dated the 3d; the first "acknowledges the receipt of \$2500 in payment for sugar this day sold," and the second acknowledges the receipt of \$800, "which amount is to be paid in sugar," but as it would make no difference in my judgment, and was not adverted to at bar, I don't think it necessary to comment upon it. It is obvious that the second payment was intended to be a part of the same transaction as the first.

In conclusion, there is nothing in natural justice that will lead the Court to declare that the transfer of the property in question was contrary to good conscience and void—but quite the contrary,—and the statute law of this Kingdom does not so enact it.

My judgment therefore is that the bill be dismissed with costs.

A. S. Hartwell, for plaintiff.

R. H. Stanley, for defendant.

Honolulu, August 31, 1874.

KAOPUA *et al.* *vs.* RUTH KEELIKOLANI.

IN EQUITY. BEFORE ALLEN, C.J.

OCTOBER, 1874.

All persons legally or beneficially interested in the subject matter of an equity suit should be made parties.

The heirs of a decedent being interested in the case, but unknown: held, that probate proceedings should be instituted to ascertain who they are, before decree in the equity suit.

The Court will not take jurisdiction where it is apparent on the record that it cannot proceed to final judgment and execution.

Demurrer sustained for non-joinder of parties.

DECISION OF ALLEN, C.J.

This is a demurrer to the bill for non-joinder of parties. It is alleged in the bill that Nahua's heirs are interested in the case, but that they are unknown.

The general rule in equity is that all persons legally or beneficially interested in the subject matter of a suit should be made parties. But there are exceptions when this rule may be dispensed with, and the question is, does this case come within the exception? All these exceptions are governed by the same principle, and that is, to accomplish the purposes of justice between the parties; but, as Mr. Justice Story says, the Court will not, by its endeavors to do justice between the parties before it, risk the doing of positive injustice to other parties not before it whose claims are, or may be, equally meritorious.

One of the exceptions is founded upon the utter impracticability of making the necessary parties, as when the party is out of the jurisdiction.

It is said by counsel that it is impossible for the complainant to make Nahua's heirs parties by name, unless by instituting probate proceedings. This can be done, he says, as well after the necessity of a decree is established as now. But if parties are necessary, they should be made so, that they may have all

the advantages of protecting their rights in the progress of the case. It is not pretended that they are not within the jurisdiction.

It is admitted by the counsel that the decree cannot be carried out, the names of Nahua's heirs being unknown, and, as it is contended, it would be a very unusual proceeding to grant a decree for or against persons unknown to the record.

I take the principle to be a sound one that the Court will not take jurisdiction of a case where it is apparent on the record that they cannot proceed to final judgment and execution. Demurrer sustained.

A. S. Hartwell, for complainant.

R. H. Stanley, for defendant.

October 1, 1874.

N.B.—The case is reported in full in 5 Haw., 675.

KAHOIWAI *et al.* vs. PAAKUKU (w.) *et al.*

IN EQUITY. BEFORE ALLEN, C.J.

OCTOBER, 1874.

Plaintiffs ask for partition of lands to which they claim title under an anomalous document, in the nature of a trust-deed, which was admitted to probate as a will: Defendants claim under an absolute deed of the same property, subsequently made by the testator:

Held, the first document, having been construed to be a will, to take effect after death, conferred no rights as against grantees under a later deed: and no fraud being proved as to the deed, the Court dismisses the bill.

DECISION OF ALLEN, C.J.

This is a petition for partition of certain lands called Kaonaulu, situate on the Island of Maui, and Kaluapalu, situate in Kalihi, on the Island of Oahu, and a Kuleana of land, situate in Wailuku, Island of Maui; and the complainants claim of and by virtue of a certain instrument in writing made by one

Keaka on the 12th of February, 1850, who was the admitted owner of the property in question. The complainants allege that this instrument is anomalous in its character, partaking of the nature of a will and a deed of trust, which was afterwards, to wit, on the 15th day of December, 1868, on the petition of the defendant Paakuku admitted to probate as the last will and testament of the said Keaka. It is further alleged and admitted that the estate was fully administered upon, and the administrator discharged.

There are other allegations in the bill touching the rents and profits of the land, received by same defendant, as well as the sale of the land in Oahu.

The defendant answers and claims that her title is derived from Keaka, the testator of the will referred to, by the deed, bearing date March 11th, 1868, of the lands called Kaonaulu and Kaluapulu, so that, in a word, the petitioners claim title to the property by the instrument in writing above referred to, and the defendant by deed.

The complainants contend that, by the will, the defendant Paakuku had a limited trust; that although she was to be the head of the family, her brothers and sisters were to enjoy the property under her as they had under the testator. It was undoubtedly the intent of the testator that they should all have an interest in the property, when she says that "all the income of these two lands and the Konohiki days on these lands shall go to Paakuku and her brothers and sisters, and their heirs after them."

This instrument is a will, and a testator has a right to make or cancel it, and there is no right which vests by it which disables the testator, during her life, from making a conveyance by deed. It will not be contended that because a person has made a will disposing of his property, which can only have effect after his death, that it operates as a restraint upon his power of conveying his property by deed during life. A deed in trust for the benefit of others, and placed upon record, would be good against a subsequent conveyance. A will is an instrument entirely different in its legal effect.

It is contended further by the petitioners that the probate of the will on the petition of Paakuku was the acceptance of the terms of that instrument, and she is precluded from claiming under a different instrument.

There was other property named in the will besides the land, and it was the duty of Paakuku, holding it, to present it to the Court for probate; but the Court does not regard it as compromising her title under the deed. She even presented the deed for probate, but the Judge declined to admit it as it was not a will.

It would not be equitable for the Court to declare that these parties compromise their rights by an error of this character, but in this she did her duty; as to the personal property she would have done injustice to other parties not to have presented the will for probate.

The counsel contend further that the pretended deed of gift of the 11th March, 1868, is not without grave suspicions of its execution, and in its very terms is a fraud upon the other heirs, and cannot affect their rights under the former will or instrument which became vested in the executor thereof, and confirmed by the action of the Court in Probate. Fraud must be proved; suspicion is not sufficient. In this case the circumstances favor the validity of the deed. By the will executed in 1850, the testator places the property in the hands of defendant to be managed as she herself had hitherto done for the benefit of herself and brothers and sisters. Eighteen years had passed, and it is very probable that the circumstances of the parties had changed, so that the testator would deem it advisable to give her the title in full, instead of imposing upon her the responsibility of taking care of the property for others, as well as herself. This relieves the case of suspicion even. It does not appear by the record that there was any adjudication by the Probate Court of the rights of parties to the real estate. There was no notice for distribution, and no decree of the Court to this effect. The administration was upon personal property only.

The Court is of opinion that the petitioners have no title to the lands Kaonaulu and Kaluapulu, and so adjudge.

There is no controversy about the title of the land in Wailuku, and the petition for partition of that land is hereby granted and decreed accordingly.

R. H. Stanley & W. C. Jones, for complainants.

A. S. Hartwell, for Paakuku.

S. B. Dole, for the other defendants.

CUDJERO *et al.* *vs.* BARK SEA BREEZE *et al.*

IN ADMIRALTY. BEFORE HARRIS, J.

NOVEMBER, 1874.

Seamen, who shipped at Japan for a whaling voyage, and to San Francisco as port of discharge, claimed to be discharged at Honolulu and to receive wages and passage to San Francisco, the ship being about to proceed to New Bedford.

Held, if the vessel were bound to San Francisco, calling here would not be a deviation; but the Court would interfere to prevent libellants being taken to New Bedford.

It appearing that the whole matter is within the American Consul's jurisdiction, and that the only object of the suit is to avoid payment by the ship of consular fees: Held, that it is no part of the duty of this Court to interfere to prevent the consul from doing his duty, or to assist United States citizens to evade the force of the laws of their own country.

Jurisdiction declined.

DECISION OF HARRIS, J.

The libel in the above case prays as follows: "That the bark Sea Breeze, and Wicks, the master of the said bark, be decreed to pay to the libellants sufficient money for them to purchase passages to San Francisco, and their support meanwhile, with the costs of this libel, and for such further relief as justice and law may require."

The allegations in the libel are that the libellants shipped in the month of May last at Nagasaki, Japan, for a whaling voyage northward, thence to San Francisco as a port of discharge; and that having completed her cruise in the Ochotsk Sea, the bark proceeded to this port of Honolulu, for the purpose of discharging her cargo and obtaining freight for New Bedford, which the libellants allege is a deviation entitling them to their discharge. And the libellants further state that Wicks, the master of the bark, says, as they are informed, that the libellants must go to New Bedford and settle the matter of complaint there, and refuses to comply with their just claims—meaning thereby, their claim to be discharged and to be paid a reasonable sum to place them in San Francisco, according to the terms of their agreement. And it likewise appears by the libel that the libellants are subjects of the Emperor of Japan. It likewise appears that the bark is an American vessel.

There was no answer put in to the libel, but the captain of the vessel appeared for himself.

It was stated by Mr. Hartwell, counsel for the libellants, that it had been proposed to him that if he would agree to take \$100 for them all (ten) that there would be no opposition made on the part of the captain and owners of the vessel.

The captain being interrogated under oath, stated that he had engaged the men at Nagasaki; that he paid them \$15 advance there, and that they had taken up some clothing on the voyage; that he had taken about 70 barrels of oil, and about 600 lbs. bone.

The captain likewise says he came here to get a freight for New Bedford, "but if we have to pay \$60 each for consular fees, we shall go to San Francisco." The fees meant are those exacted by the United States law from ships sailing under their flag for men discharged in a foreign port. The captain continues to say: "it is more than likely we shall go to New Bedford."

Now, if the ship shall proceed ultimately to San Francisco, whither she can go and arrive within the time ordinarily desig-

nated as a season's cruise, clearly there would be no deviation from her voyage, and it would be a novel thing in this ocean if it should be held that a whaling vessel which was bound to discharge her men in San Francisco, and which called here with a view to obtain information or for any other cause, her crew was to be discharged by this Court by reason of her deviation. A whaleman on a cruise is bound to no particular point, and cannot be said to be deviating from his voyage by reason of his putting into this port or that port, as long as he is pursuing the legitimate object of his cruise. The captain has not broken up his voyage yet, though it appears he contemplates the possibility of so doing. Truly if the ship was about to proceed to New Bedford and take these men with her, their contract to the contrary notwithstanding, and the United States Consul would not interfere to discharge the men, and thereby prevent so great a wrong—a thing which is in itself insupposable and which certainly is not presented in this case—then the Court would interfere in favor of the subjects of a friendly power.

If the captain is willing to discharge these men here, and they are willing to be discharged, and the captain is willing to pay them \$10 each, and they are willing to take it, there is no reason why they should not do so without invoking the aid of this Court.

But it is said at the hearing that the payment of the \$60 required by the consul would be no benefit to the men, and involve the ship in great expense if the consul follows literally the United States law, and that this course would be very agreeable to the parties interested, and the commercial community here. No doubt it would! but it would appear from all these remarks that it is not a *bona fide* case between litigants but a mode of avoiding the fees exacted by the United States from her own citizens owning vessels sailing under her flag. Now, passing by the fact that the prayer of the libel does not in form ask for a discharge, and supposing that it did ask for one, it is not for the Court to decide whether it would have the effect to absolve the ship from the consular dues, since the adminis-

tration of their own law is a matter which does not concern us, but lies entirely between the United States Government, its consul and its citizens.

But it is certain that it is no part of the duty of this Court to interfere to prevent the consul from doing his duty, or to assist the United States citizens to evade the force of the laws of their own country.

It was said at the hearing that a proposition had been made to discharge the men if they would pay the \$60 required by the United States law.

Now the men, it is alleged, are entitled to their discharge any way, provided the ship sails for any port except San Francisco, and the law which is referred to was passed for the protection of the men, and to prevent their being left destitute on a foreign shore. Consequently the money is to be paid by the ship and not by the men, and I have not a doubt that the United States Consul will see to it, that these men neither go to New Bedford, whither they have not agreed to go, nor have \$60 a-piece taken from them against right and justice—or in other words, he will see to it that these Japanese do not, through their ignorance of American law, pay the money that the owners of the vessel are bound to pay.

Whensoever it shall be made to appear to this Court that its interference is necessary to redress a great wrong in a matter of foreign seamen—to prevent a failure of justice—it will not in the future, as it has not in the past, be backward in using its authority. But where, as in this case, justice between the parties is obtainable at the hands of the authorities whose flag the ship carries, and who are appointed in this country to administer the laws which such country has seen fit to enact, for the government of their mercantile marine, this Court will not interfere, and declines to do so in this case.

A. S. Hartwell, proctor for libellants.

Captain Wicks, in person.

Honolulu, November 9, 1874.

J. T. WATERHOUSE *vs.* D. H. HITCHCOCK *et al.*,
Assignees.

IN EQUITY. BEFORE JUDD, J.

DECEMBER, 1874.

A firm having made an assignment for benefit of creditors, one of the creditors files a bill against the assignees to compel an accounting and payment:

Held, on demurrer, that all the creditors named in the deed of assignment are necessary parties to the suit.

Demurrer sustained.

DECISION OF JUDD, J., ON DEMURRER.

The bill alleges that the plaintiff is a private creditor of Siemens, one of the firm of Siemens & Conway; that they made a general assignment to the defendants for the benefit of the creditors of the firm, as well as of their private creditors, and prays for an account, etc.; in short it is the usual bill of a creditor claiming the benefit of an assignment and proceeding against the assignees to compel an account and payment of the distributive share of the proceeds.

The bill is demurred to on the ground that it appears by the deed of assignment that certain parties, naming them, are creditors of Siemens & Conway, who are, therefore, interested in the trust and are necessary parties; and it is claimed that, either these creditors should be made parties to the bill, or it should be brought in behalf of the plaintiff and all the other creditors who may choose to come in and take the benefit of the decree.

Plaintiff's counsel urges in reply that this is not a proper ground of demurrer because it does not appear on the face of the bill that these parties are creditors. It is true that the bill does not make profert of the deed of assignment, and it is therefore no part of the record, and the Court has no knowledge thus far as to who are creditors. It is, however, apparent on the face of

the bill that there are other creditors. In article fourth, the bill sets forth that the deed of assignment was made to the defendants "of all the property of Siemens & Conway and each of them in trust for the benefit of the creditors of them and of each of them." In article fifth, it is alleged that plaintiff requested defendants "to pay his claim or a just dividend thereon, *pari passu*, with claims of other separate creditors," etc. The second prayer of the bill asks for discovery "of all claims against said Siemens & Conway," and the third prayer asks that "an account be taken of all said claims, and that the defendants be decreed to pay the plaintiff a just and fair dividend on said claim." This language shows that the assignment was not for the benefit of the plaintiff as the sole creditor, in which case he alone could sue, but that it was a general assignment for the benefit of all the creditors of Siemens & Conway.

Having disposed of this objection, the main question remains: Is the bill demurrable in that it is not brought in behalf of plaintiff and of all other creditors?

Story, in his Equity Pleadings, §157, says: "Where the assignment is made by a debtor for the benefit of his creditors, if any creditor seeks to enforce the trust, he cannot sue alone; but he must make all other creditors provided for in the assignment, parties, either by name, or by bringing the suit on behalf of himself and all the other creditors who may choose to come in and take the benefit of the decree." In Sec. 216, *id.*, "Where there is a general trust for creditors or others, whose demands are not distinctly specified in the creation of the trust, as their number, as well as the difficulty of ascertaining who may answer a general description, might greatly embarrass the due execution of the trust, Courts of Equity will dispense with all the creditors and others interested in the trust being made direct parties. And it will be sufficient, if the bill is brought to enforce the due execution of the trust, that it should be brought on behalf of all interested. Burrill on Assignments, Chap. 51, is to the same effect.

The cases whence these text writers deduce this doctrine are,

Wakeman vs. Grover, 4 Paige, 23; *Bryant vs. Russell*, 23 Pick., 508; *Houghton vs. Davis*, 23 Me., 28.

Where the creditor is not seeking to enforce the trust, but is acting in hostility to the assignment, seeking to avoid it on the ground of fraud or other illegality, it is not necessary that all creditors should be made parties, for in this class of cases the assignee himself sufficiently represents the other creditors. *Wakeman vs. Grover*, above cited, and *Riggs vs. Murray*, 2 Johns. Ch., 565.

Counsel for plaintiff contends that *Silloway vs. Columbia Ins. Co.*, 8 Gray, 199; *Moody vs. Gay*, 15 Gray, 457; *Barry vs. Abbot*, 100 Mass., 396, are authorities that a creditor may institute such a suit for himself alone, and that it is not necessary to be brought for himself and all other creditors.

But these cases are merely the judicial construction of Mass. Statutes of 1851, Chap. 206, and 1858, Chap. 34, where these words: "The Supreme Judicial Court shall have jurisdiction in equity upon a bill by any creditor, to reach and apply in payment of a debt, etc., etc.," are held to give the right to any person to bring a "creditor's bill" by himself alone.

In the State of Massachusetts, before the enactment of this statute of 1851, it was held that when a creditor "seeks to carry into effect an assignment in trust for the benefit of creditors, and to obtain his proportion of the trust fund, he is bound to make all the creditors parties. Or some of the creditors may sue in behalf of themselves and the other creditors who may come in and obtain satisfaction of their demands equally with the plaintiffs in the suit."

In this case Wilde, J., says: "This form of proceeding, while it prevents delay, and the multiplicity of suits which are never encouraged, furnishes the Court at once with the means of administering equal justice to all parties interested." *Bryant vs. Russell*, 23 Pick., 523.

The case of *Houghton vs. Davis*, above cited, gives as a reason why all creditors should be made parties; that in such cases, each creditor is to be paid *pro rata*, and the rights of all credi-

tors will be affected by a decree which may lessen or enlarge the number of creditors and the amount of debts on which a dividend may be made. The proportion of one creditor cannot be determined and extracted from the common fund without deciding upon the proportion that would be payable to each of the others.

The Court is not in a position to make a decree awarding to the plaintiff a certain per centage on his claim without ascertaining what are the claims of other creditors whose positions must be identical with the plaintiff's, if he is entitled to have this trust enforced; they are therefore necessary parties.

I deem an allegation like the one set forth in the demurrer necessary in a bill of this kind; but, as this defect is not fatal, will permit such an amendment to be made on payment of costs.

A motion to amend may be made, or the bill dismissed.

A. S. Hartwell, for plaintiff.

R. H. Stanley, for defendants.

Honolulu, December 24, 1874.

BANKRUPTCY OF THOMAS SPENCER.

BEFORE JUDD, J.

JANUARY, 1875.

In a statutory proceeding by a creditor to declare a debtor bankrupt, the Court has jurisdiction to hear a plea of equitable estoppel: following *Kamohai vs. Kahele*, 3 Haw., 530.

The promise of a creditor that he would not press respondent for payment of a note, held not to estop the creditor from bringing proceedings to put respondent into bankruptcy; the misrepresentation being of intention only and not of fact.

The creditor's promise held not to be a new contract extending time of payment, but a *nudum pactum*; or, if a contract, only executory.

The claim of petitioner being held good, respondent is adjudged bankrupt.

DECISION OF JUDD, J.

Plaintiff's petition and bond, as required by statute, were filed 14th December, 1874; order to Marshal to take possession of defendant's property, and summons to defendant to attend, issued same day and made returnable January 2d, 1875. Order was returned by the Marshal, December 21st, 1874. On the 2d of January, 1875, the day appointed by the Court for the hearing of the parties on the question of the alleged bankruptcy, Theo. H. Davies, a creditor of said defendant, appeared with a plea of an equitable estoppel to petitioner's claim. The Court having ruled that other creditors were not parties to this matter, the defendant, by his counsel, adopted this plea, referring to affidavits filed by said Davies and by George W. Macfarlane, said Davies' attorney in fact. Petitioner's counsel demurred to the plea on the ground of want of jurisdiction.

The Court proceeded to take the testimony that the petitioners are creditors; that is, heard the testimony offered to support their claim, and also the testimony offered against it, and also testimony that the defendant has committed an act of bankruptcy. The remaining findings of fact will appear in the decision.

BY THE COURT.

I am of opinion that the testimony shows that Thomas Spencer owes debts to the "amount of \$2000" and over, and that "he has refused or failed to make payment of some (any) of his just demands for ten days after the same had matured and had been presented for payment to him or his agent." Whether some of these claims having been purchased at a discount, or arranged for by a mortgagee, are in a position to be sued upon by the original holders, may be questioned, but that Spencer owes to some one money evidenced by promissory notes still outstanding against him to an amount far beyond the limit required by the statute, cannot admit of a doubt; and that he has failed or refused to pay them after due demand, is also undoubted.

The remaining point, the validity of the petitioner's claim, is more difficult of solution.

In the first place, as regards the jurisdiction of Court to hear the defence offered to the claim: It cannot be controverted that the claim of the petitioning creditors must be a legal valid one; or, as expressed in Edwin James' Bankrupt Law, page 269, "The debt must be of such a nature that an action at law might be brought for it by the petitioning creditor against the bankrupt." If it were not so, any man could be thrown into bankruptcy upon fictitious claims. Now, in order to ascertain whether the claim be in fact a valid one, though apparently so on its face, the Court must hear whatever defence may be offered to it. The petitioner's claim in this case is upon two promissory notes, each dated 1st June, 1871, for \$562.25, payable in eight months, and it would be perfectly competent to plead any of the usual defenses to actions on promissory notes, as payment, forgery, set off, tender, statute of limitations, etc.

But it is contended that in this statutory proceeding which is limited and summary, the Court cannot exercise the equitable jurisdiction and take cognizance of the plea. I am of the opinion that the case of *Kamohai vs. Kahele* (April term, 1874) fully authorizes me, in considering, as a Court of law, the question of the validity of the petitioner's claim, to take cognizance of equitable estoppels. I have no hesitation in assuming this jurisdiction, and must now enquire if the facts constitute an equitable estoppel. I will assume it as proved that in August, 1874, Macfarlane, who was acting as Davies' agent, who was endeavoring to arrange defendant's indebtedness so that it would be safe to proceed to make him advances and carry on his plantation, succeeded in getting from Louisson, the managing partner of the petitioner's firm, a promise that he would not molest the defendant; in other words, that he would extend the time of payment of the already overdue notes and receive his pay in installments.

All the following elements must be present in order to an estoppel by conduct or *in pais*:

"1. There must be a representation or a concealment of material facts.

"2. The representation must be made with a knowledge of the facts.

"3. The party to whom it was made must have been ignorant of the truth of the matter.

"4. It must have been made with the intention that the other party should act upon it.

"5. The other party must have been induced to act upon it." Bigelow on Estoppel, pp. 480 and 481.

"The representation or concealment must also, in all ordinary cases, have reference to a present or past state of things, for if the party make a representation concerning something in the future, it must generally be either a mere statement of intention or opinion uncertain to the knowledge of both parties, or it will come to a contract, with all the peculiar consequences of a contract."

In *Langdon vs. Doud*, 10 Allen, 433 (1865), a debtor being about to go away from the State of Massachusetts, represented to a creditor that he did not intend to return, when in fact he did return and was sued after the lapse of six years; it was held that in pleading the statute of limitations he was not estopped by his representation that he did not intend to return.

The Court say that this representation was not of any existing fact or state of things, but merely of intention. The intention of a party concerning his future action is necessarily uncertain. A person cannot be bound by any rule of morality or good faith not to change his present intention. The doctrine of estoppel wholly fails when the representation relates only to a present intention or purpose, because, being in its nature uncertain and liable to change, it could not properly form a basis or inducement upon which a party could reasonably adopt any fixed and permanent course of action.

Tested by these principles, do the facts of the case before us constitute an estoppel? Louisson misrepresented no facts; he stated no material facts but what Macfarlane knew and what is

not denied; that is, that he held a claim against Spencer. He merely made a declaration of his intention not to molest Spencer, and his hopes of getting his pay by-and-by.

The main ingredient of an estoppel is therefore wanting, "the representation or concealment of material facts."

Does this testimony establish a new contract, which is a good defense to the note? Parsons, in his Notes and Bills, vol. 2, p. 530, says: "A defence to a note payable in one year, that an oral collateral agreement provided that payment should not be demanded until the expiration of five years, is no bar to a suit brought before the lapse of a longer period." This is taken from *Dow vs. Tuttle*, 4 Mass., 414, and in this case the agreement was in writing and contemporaneous with the note, and might very properly have been construed as part of the original transaction, yet the Court held it no defence.

In *Parker vs. Russell*, 17 Pick., 280, "A maker of a promissory note, after it became due, entered into a parol agreement with his creditors and F., by which it was stipulated that F. should, from time to time, receive the maker's wages from his employers as they became due, for the benefit of his creditors, and that the holder of the note should receive payment of the note in monthly installments, through the hands of F., and should not commence an action against the maker so long as the agreement should be complied with. Two installments were paid. It was held that such agreement did not constitute a legal defence to an action upon the note by such holder."

In *Allen vs. Kimball*, 23 Pick., 473, a note was made, but before it was payable, the holder, for a good consideration, agreed verbally that he would not consider it as due until the expiration of two months from the time of its original maturity, and it was held that such agreement, being executory, was not a bar to an action commenced on the note by such holder before the two months had expired. A covenant by the payee of a promissory note not to sue the maker within a limited time, cannot be pleaded in bar to an action brought within the time by a person to whom the note was endorsed, after it became due. *Perkins vs. Gilman*, 8 Pick., 229.

In *Munroe vs. Perkins*, 9 Pick., 298, it is laid down that a contract may be waived by a parol agreement, if the new agreement shall be executed.

The case of *Harris vs. Brooks*, 21 Pick. 195, is cited as an authority in favor of the position that the defense at bar is good.

In this case there was a parol declaration by the holder of a promissory note to the surety, after the note had fallen due, that he would exonerate the surety and look to the principal, and this was held a good defense in an action by the holder against the surety. This was an accommodation note entirely for the benefit of the principal, and the surety had expressed to the holder his willingness to pay it because he could then get security of the principal; but the holder verbally discharged him and agreed to look to the principal, and the Court held that as this declaration lulled the party into security and prevented him from attaining his indemnity, it would be a fraud on the part of the holder afterwards to call on such surety for payment.

This case bears no resemblance to the case at bar; Spencer has not been lulled into any security by Louisson's promise, nor has he lost his means of obtaining indemnity on this note, for there is no surety in this case from whom to obtain indemnity, and he is liable as principal in any event.

Louisson's promise then is a mere *nudum pactum*—there is no consideration for it—for Macfarlane makes him no promise, and Spencer promised to pay by the terms of the note, and his new promise to pay him by installments is no better; and the new contract, if a contract at all, is only executory and has not been executed.

Upon a careful examination of the testimony and a reviewing of the principles of law applicable, I am of the opinion that the petitioners have shown a good claim against Spencer, and that no defense either in law or in equity has been established. I must therefore decree and adjudge Thomas Spencer to be bankrupt; but I express no opinion as to the right of his assignees,

when they shall be elected, to the possession of the sugar estate, or on the priority of any of the liens or claims, as being matters upon which evidence has been put into the case incidentally.

A. S. Hartwell, for petitioner.

R. H. Stanley & W. C. Jones, for respondents.

Honolulu, January 15, 1875.

C. LARRISCH *vs.* F. A. SCHAEFER.

BEFORE JUDD, J., ON APPEAL FROM POLICE JUSTICE OF
HONOLULU.

JANUARY, 1875.

A Police Court summons, if no written complaint is filed, should contain in brief all that is essential to a complaint; but objections as to form must be made before trial in lower court.

An agreement containing "apt words of present demise," held to be a lease, and not void for uncertainty as to beginning of the term.

A lease stipulated that the lessee could renew at end of term: held, following *Campbell vs. Akana*, 3 Haw., 571, that occupation and payment of rent by lessee, after end of term, was virtual notice of his intention to hold the premises for the additional term.

DECISION OF JUDD, J., ON MOTION.

Defendant's counsel moves to dismiss the summons on the ground that it does not apprise the defendant what the plaintiff seeks—that is, it asks for nothing. Plaintiff's counsel contends that as the summons issues from the Police Justice upon an oral complaint, he is not responsible for its defects; and as this case is appealed on the merits, this motion is too late.

I am of the opinion that if the plaintiff files a written complaint, the summons issued by the magistrate need only recite that the plaintiff claims as by the annexed complaint; but if the summons is filled out upon an oral statement—more

especially if this is done by the plaintiff's counsel—it should contain in brief all that is essential to a complaint. In this case there should be in the summons a statement that plaintiff asks restitution of the premises, or that the plaintiff asks that the premises may be restored to his possession.

But the defendant having gone to the trial in this case in the lower court, where this objection could have been made and the defect cured either by amendment on terms or by plaintiff taking a nonsuit, I do not think it just to dismiss the case now, but will allow the amendment to be made. The question of costs to be considered on final disposition of the case.

Honolulu, January 23, 1875.

DECISION OF JUDD, J., ON THE MERITS.

This is an action brought under Chapter XL. of the Civil Code to recover possession of certain premises on Nuuanu Avenue, Honolulu.

The plaintiff put in evidence a lease dated March 30, 1869, between plaintiff's wife Elizabeth Grimes, who owns the premises, and the defendant, whereby the premises are demised to defendant for one year at the rental of twenty-five dollars per month, and there is a privilege of renewal for one year at the same terms. The defendant entered under this lease.

The following paper was also put in evidence:

"The following agreement of lease has been entered into between Elizabeth Grimes of the first part and F. A. Schaefer of the second part, to wit:

"The party of the first part rents to the party of the second part the house and premises, with exception of the taro patches, situated on the Punchbowl side of Nuuanu Valley, above the first bridge, for the term of two years for his sole use, together with the outhouses thereto belonging.

"The party of the second part agrees to pay to the party of the first part, for the above premises, rent at the rate of twenty-five dollars monthly in monthly payments. Of the water rates

the party of the first part pays fifteen dollars, and the party of the second part ten dollars yearly.

"This lease, at the same rental, may be continued for five years after the expiration of the term of this lease at the option of the party of the second part.

"Dated Honolulu, August 1, 1869.

(Signed) ELIZABETH GRIMES, [L.S.]

(Signed) F. A. SCHAEFER." [L.S.]

This is acknowledged by the parties on the 13th August, 1869, and recorded the same day.

Notice to quit was served October 15th, 1874, and the marriage of plaintiff with said Elizabeth Grimes is admitted to have taken place on the 17th November, 1869; it is also admitted that defendant has continued in possession of the premises up to this time.

BY THE COURT.

The plaintiff contends that the defendant's tenancy has expired by efflux of time, as the term of one year from March 30, 1869 (the date of the original lease), and the additional year of renewal, ended on the 30th March, 1871; and that the paper put in evidence, above recited in full, is either void for indefiniteness, as having no definite time of beginning, or that it is merely an agreement for a lease, and is executory in its terms.

Defendant claims he is rightfully in possession by virtue of this paper, which he contends is a valid, executed lease; and that its acceptance on the 1st August, 1869, operated as a surrender of the first lease.

The two questions presented, are:

1. Is this paper a lease or an agreement for a lease?
2. Is it void for uncertainty?

On the first point Washburn says:—"And whether the instrument is to be construed as a present demise or a contract for a future one depends upon the intention of the parties, as gathered from the whole instrument, rather than any particular form of expression in any particular part of the agreement, though, as a general proposition, if there are apt

words of a present demise followed by possession, the instrument will be held to pass an immediate interest." 1 Wash., R.P., p. 300.

Chancellor Kent, Vol. 4, Comm. p. 108, says: "It is sometimes a question whether the instrument amounts to a lease, or is merely a contract for a lease. It is purely a question of intention." *Poole vs. Bently*, 12 East, 168.

In the case cited by plaintiff's counsel, *McGrath vs. Boston*, 103 Mass., 371, I find these words: "If the instrument upon its face purports to be the contract upon which the occupation is to be enjoyed, and the relations and rights of the parties to be defined, and it contains apt words to operate as a present demise, it will be so construed."

The paper before the Court, in my opinion, contains "apt words of present demise," to wit, it reads, "The party of the first part rents to the party of the second part, etc."—it defines the rent reserved, and contains a stipulation in regard to water rates—in short, "it fully defines the relations and rights of the parties, and purports to be the contract upon which the occupation is to be enjoyed," and does not indicate to my mind that the parties contemplated a lease to be drafted.

On the second point: Is the paper which I now call a "lease," void for uncertainty as to the time of beginning its term? I again quote from Washburn: "Although a lease is said generally to take effect from the time of its making, it is apprehended that the time at which only it takes effect is when it is delivered. It is unimportant when it was written, and it is competent to show by parol when it was delivered, although no date or a different one from that of its actual delivery was inserted in the indenture." 1 Washburn, R.P. p. 292.

In Taylor's Landlord and Tenant, p. 42, I find this learned author says: "In reference, however, to the obligations of the parties, and regarding the lease as a contract, if the time from which it is to commence does not otherwise appear, it will be understood as commencing from the time they were delivered."

In the case of *Styles vs. Wardle*, 4 Barnewall & Cresswell, p.

911, Bayley, J., says: "A deed has no operation until delivery, and there may be cases in which, *ut res valeat quam pereat*, it is necessary to construe date, delivery. When there is no date, or an impossible date, that word must mean delivery."

In the case before the Court there is no evidence of the date of delivery, but I infer that the lease was delivered on the day of its date, August 1, 1869. If this point is in doubt, it certainly was delivered in law, on the 13th August, 1869, when it was recorded at the office of the Registrar of Conveyances.

The term of second lease has therefore, I hold, a definite beginning, to wit: its date the 1st August, 1869, and it is not void for uncertainty.

The acceptance of both parties of the second lease is, of itself, a surrender of the former lease, on the theory that the lessee is estopped to say that his lessor has no power to make a new lease, and as the lessor could not grant a new lease until the prior one had been surrendered, the law will hold that the lessee has surrendered the prior lease. Taylor's Landlord and Tenant, p. 335; 1 Washburn R.P. 351.

The term of the second lease expired August 1, 1871, but on the authority of *Campbell vs. Akana*, 3 Haw., 571, I am obliged to hold that the continuing by the defendant to occupy the premises and to pay the rent is a virtual notice of an intention to hold the premises during the entire additional term of five years; this term not expiring until August 1, 1876, the defendant is rightfully in possession of the premises, and judgment must be rendered in his favor with costs.

A. S. Hartwell, for plaintiff.

R. H. Stanley, for defendant.

Honolulu, January 26th, 1875.

THE KING *vs.* ABIGAIL MAIKAI.

BEFORE HARRIS, J.

JANUARY TERM, 1875.

Defendant pleaded guilty before a Police Justice, and appealed to the Supreme Court for mitigation of sentence. In the Supreme Court, a jury trial was held, without objection.

Held, the verdict must be set aside by the Court, on its own motion, upon the matter being brought to its attention, and the judgment of the Police Justice stands.

DECISION OF HARRIS, J.

In reflecting on this matter, I am convinced that the proceedings before the jury should be declared a nullity. It is a case which does not need a motion on the part of counsel, but the Court itself is obliged to take notice of it for the purpose of keeping its own record straight.

The defendant pleaded guilty in the Police Court of Honolulu, to the charge of giving, selling or furnishing intoxicating drinks to natives of this Kingdom, and upon that plea a judgment was rendered the next day by imposing a fine of \$100, from which judgment she appealed, as she had a right to do, for the Court above might impose a less penalty. This plea of guilty was never altered or withdrawn, nor was it sought to be altered or withdraw, and if a request of this kind had been made here, it would have been refused, the plea having been made before a Court having full jurisdiction in the case, and which had authority to permit an alteration in the plea, and undoubtedly would have done so at any time before final judgment. When the case was called, a motion to empanel a jury was made and no one objected. The only paper which was brought to the notice of the Court was a certificate that such a judgment had been rendered and defendant had appealed from it. Thus the Court was not apprised that a plea of guilty had been entered, until in the progress of the case it transpired in

evidence. It would have been better undoubtedly that I had immediately withdrawn the case from the jury; but I suppose that it will be conceded that when a case is going on before a jury, it is usual for the judge to trust a good deal to experienced counsel.

But admitting that it would have been better to have withdrawn the case immediately from the jury, it is certain that every lawyer must see and concede that there was never any issue before the jury on which they could pass; and if there was never any issue for them to pass upon, the whole proceedings were a nullity, and it is ordered that the verdict rendered in this case be considered as a nullity, and the judgment of the Police Court will, of course, stand.

The Attorney-General, for the Crown.

A. S. Hartwell, for the defendant.

January, 1875.

BANKRUPTCY OF S. C. ALLEN.

BEFORE HARRIS, J.

FEBRUARY, 1875.

The bankrupt having petitioned for a discharge from his debts, under Section 983, Civil Code: and having obtained "consent of a majority of his creditors in value and number within this Kingdom:"

Held, that creditors resident in California, although represented here by power of attorney, are not "within this Kingdom:" and that treaty provisions as to foreigners resident in this country do not apply to them: they may allege their reasons for refusal of a discharge, but are not entitled to vote on the matter.

Theory of our bankrupt law considered: and the bankrupt held entitled to his discharge.

DECISION OF HARRIS, J.

Mr. Samuel C. Allen having complied with all the provisions of the Bankrupt Act, now petitions for a discharge from all his

debts, presenting simultaneously with his petition a paper signed by a majority of his creditors in value and number within this Kingdom. The statute under which he claims his discharge reads as follows:

Section 983, Civil Code.—“Every person who, upon finding himself insolvent, shall declare himself a bankrupt, or may have been adjudged a bankrupt on petition, as provided in this article, and who shall surrender, discover, and deliver over to the assignees chosen by his creditors all his property, personal and real, shall, with the consent of a majority of his creditors in value and number within this Kingdom, be entitled to a certificate of discharge from all his debts, to be given him by the Chief Justice of the Supreme Court; provided, however, that no such discharge shall release any person who may be liable for the same debt, as a partner, joint contractor, indorser, acceptor or surety for or with the debtor.”

But it is objected on the part of Messrs. Williams, Blanchard & Co., and Messrs. Welch & Co., doing business in San Francisco, State of California, that the applicant cannot have his discharge: First, because he has not the assent of a majority of his creditors in number and quantity, if they be taken in the Kingdom, as they withhold their consent; and they say that though corporally outside of the Kingdom, they are for the purposes of this statute within the Kingdom, because they are represented here by persons holding their powers of attorney. And in this connection they say that the only just motive for a statute of this kind is to “save debtors from delay in waiting the pleasure of absent creditors.”

Secondly, that if the statute is held to oust these contestants of equal rights to be heard on the question of the release of the applicant, they rely on the numerous treaty provisions which secure them all the civil rights which subjects have “to enjoy their property in as full and ample a manner as subjects.”—American Treaty, Article 8. “Full and perfect protection in regard to their property and the same right as native subjects.”—British Treaty, Article 8. “The same protection as regards

their properties as native subjects," etc.—Bremen Treaty, Article 2.

I apprehend that it is a mistake to suppose that the *only* just motive for passing a statute of this kind is "to save the delay incidental to waiting the pleasure of absent creditors," for bankrupt laws are passed not only for the benefit of the individual who seeks to be discharged from his debts, but of the community—to give to the community in which the debtor lives the advantage of his renewed hope, energy and enterprise. They are based on the proposition that the debtor, having given up all his property, and being free from imputation of fraud in the matter of his bankruptcy, it is just towards him, and for the interest of all his fellow citizens, that his future efforts should not be hampered by his previous debts; and it is on this last point that the creditors residing abroad have no interest. The debtor having complied with certain conditions, the community, acting through the Legislature, prohibit their courts from entertaining any further suits against him for debts incurred before.

They might have vested the authority to discharge absolutely in the Court, but have chosen to limit the authority of the Court by requiring as a last condition (all others having been fulfilled) the consent of a majority of the creditors in number and value within the Kingdom. Thus it will be seen that the statute does not preclude the foreign creditors from an "equal right to be heard on the release." On the contrary, they have a right to be heard to offer reasons against the discharge; and if they establish concealment of property, collusion with other creditors, mutilation of documents, or, in general terms, fraud, a discharge would not be granted notwithstanding the consent of the majority. It is only when all have been heard, and all things have been found to be straight, and no further *reason* can be urged against the discharge, that the policy of the law comes in and says in effect: Creditors have got all the property of which the debtor is possessed; and though we limit the authority of our Courts to discharge by requiring the consent of the majority in number and value of those resident in this country, we will

limit it no further; and the foreign creditors who are inaccessible to the calls of sympathy, and to whom a debtor's daily difficulties do not appeal, upon whose mind chagrin at having lost his debt may be, and probably is, the only influence, shall not have any vote to prevent our Court from granting our fellow citizen his discharge.

The provisions in the treaties referred to will be better understood and applied if quoted in full. The American Treaty reads as follows: "And each of the two contracting parties engages that the citizens or subjects of the other residing in their respective states, shall enjoy their property and personal security in as full and ample manner as their own citizens or subjects, or the subjects or citizens of the most favored nation, but subject always to the laws and statutes of the two countries respectively."

It will be seen that this provision is about foreigners resident in this country. This statute is not opposed to it in any way. It does not put foreigners resident in this country on any different footing from native subjects.

The British Treaty reads: "The subjects of either of the contracting parties, in the territories of the other, shall receive and enjoy full and perfect protection for their persons and property, and shall have free and open access to the courts of justice in said countries, respectively, for the prosecution and defense of their just rights."

It will be seen again that this concerns foreigners resident within this country, and surely the contestants in this case are not complaining that their persons or their property are not receiving full and perfect protection within the provision of this article. If it can be said that the discharge of a bankrupt is withdrawing full and perfect protection, it would be the same withdrawal if the Court should be authorized to do so without the concurrence of any body; as it is, they are authorized to grant the discharge after having the concurrence of the majority of the creditors in number and value resident or being in the country.

It will be seen by the course of reasoning adopted that I do not regard Messrs. Williams, Blanchard & Co., and Welch & Co., as being within this Kingdom as meant by the statute, because they are represented by a power of attorney.

A. S. Hartwell, for contestants.

Samuel C. Allen, in person.

February 12, 1875.

AHO *vs.* AHUNA *et al.*

IN EQUITY. BEFORE HARRIS, J.

FEBRUARY, 1875.

The question as to whether a wife can by will bar her husband of curtesy held not necessary to be decided in this case: the question being as to ownership of crops on the wife's land, and it appearing that the husband, living apart from his wife, assented to cultivation of the land by a tenant, who supported the wife: the tenant has, therefore, a reasonable time to harvest his crop.

DECISION OF HARRIS, J.

The bill sets forth that the land—the crops whereof are the subject of this suit—is the property of Kalemela (w.) and Naaleokahualoa (w.) who were tenants in common, which land is “described in Exhibit A., hereto attached.”

Kalemela was the wife of the plaintiff Aho, and died in the month of April last, leaving a son, who is the son of the plaintiff, to whom she devised her share of the land in question by a will duly admitted to probate on the 14th April last, when the aunt of the infant, Naaleokahualoa, one of the defendants, and the infant's father, who is plaintiff in this case, were appointed guardians of the property of the infant. So that it is evident that the infant Kama Aho, by right of his mother, is tenant in common of the land with his aunt.

The bill goes on to recite that Ahuna, one of the defendants, with the consent of the other defendant—who is, or has been as

said before, tenant in common of the land—has cultivated several crops of kalo and disposed of them to his sole use, and has a crop of kalo now matured; and that both of these defendants refuse to deliver over any part of the kalo now on the land, and to account for any part of the preceding crops, and the prayer is: "That the defendants deliver over to the plaintiff his just share of the present crop, and account for his just share of the former crops, and that a partition be made of the land."

It appears by the answer and proofs that the mother of Kalemela and Naaleokahualoa was alive until very lately, and that all the cultivation which the defendant (Ahuna) did, except the crop that is now in the ground and one before, were cultivated by the permission of the said mother; so that the whole matter is reduced to the crop now in the ground and the one preceding.

The plaintiff says that he is entitled to the profits of the land after his mother-in-law's decease and during his wife's life-time, that is, for one crop, by virtue of his marriage, and that she could not make a will which, after her decease, would bar him of his curtesy during his son's minority. The statute regarding the right of married women to make wills reads as follows:

Civil Code, Sec. 1464: "Any married woman may dispose by will, of all property belonging to her in her own right, in like manner as a person under no disability might do."

And the statute regarding a husband's curtesy in the wife's estate reads as follows:

Civil Code, Sec. 1286: "Provided, that in case his wife shall first die, the husband legally married as aforesaid, shall cease to have control over the immovable and fixed property of his wife, and the same shall immediately descend to her heirs as if she had died sole, unless there happen to be legitimate issue of the marriage within the age of legal majority; in which case the husband shall continue to enjoy a curtesy in said immovable or fixed property, until such issue shall attain majority,

when the same shall descend to the heir or heirs of the body of the wife."

The proofs disclose the facts that the plaintiff and his deceased wife Kalemela lived apart; that by her authority whilst so living apart from her husband, Ahuna, one of the defendants, cultivated the patches which were her property, and in consideration thereof supplied Kalemela with the necessities of life.

To this occupation and use of the land the husband did not object. It was a natural and reasonable use of the land under the circumstances, and the husband must be presumed to have assented to the disposition which the wife made of the property. This will certainly dispose of the crop which preceded that now in the ground, and the tenancy with the consent of the husband is established. The defendant Ahuna commenced to plant the crop now standing under the arrangement above indicated, and during the year Kalemela died. It will follow that the tenant is entitled to such time as is necessary for his crop to mature and be gathered; and the plaintiff again must be presumed to have assented to the crop being put in by the defendant on the terms agreed by the wife, and consequently can have no interest in the crop.

This view of the case renders it unnecessary to decide in this case whether the curtesy of the husband is barred by the will of the wife.

The land should be divided between Naaleokahualoa and the infant son of Kalemela; and the defendant, Ahuna, should remove his kalo from the infant's portion as soon as possible. John E. Barnard, Esq., and Curtis J. Lyons, Esq., are appointed commissioners to divide the land. Thus it will be seen that the question of right by curtesy does not affect this case, and the plaintiff being guardian for his son, it probably will not arise between them.

Costs to be divided equally between the parties, one half to the plaintiff and one half to the defendants.

A. S. Hartwell, for plaintiff.

S. B. Dole, for defendants.

February 13, 1875.

EDWARD EVERETT *et al.* *vs.* B. F. BOLLES.

IN EQUITY. BEFORE JUDD, J.

MARCH, 1875.

The Marshal, upon receiving an execution, read it over to defendant, but did not take any property in his custody or make an inventory: a garnishee process in another suit was subsequently served on defendant:

Held, there was no levy of execution, and the subsequent garnishment was good.

A judgment debtor can be held as garnishee of a judgment creditor. Part-owners of a vessel are tenants in common.

DECISION OF JUDD, J.

An order was issued to the Marshal, returnable February 16th, 1875, to show cause why the execution in the above entitled cause, issued February 2d, should not be fully satisfied.

It appears that on the 8th day of February a garnishee process was issued from the Supreme Court in the suit of *Bishop & Co. vs. Everett*, one of the above plaintiffs, B. F. Bolles (defendant above), garnishee, and the answer of the Marshal sets up that the defendant Bolles retained the sum of \$390, as said garnishee, to abide the judgment of the Court, and he submits whether such retention is not sufficient satisfaction of the execution, inasmuch as no levy was made by him in the first suit, and the garnishee served with process of garnishment was bound by the statute to retain the amount in his hands at the time of service to meet the judgment of *Bishop & Co. vs. Everett*.

The facts in regard to the service of the execution are as follows:

The Marshal received the execution at 2:30 p.m. on Tuesday, February 2d, 1875, and on the same day he went to the defendant Bolles, read the execution to him and demanded the

amount of the judgment, informing him that he (the Marshal) should keep under his supervision the property of the said Bolles until the said judgment should be satisfied. On the 6th February, plaintiff's counsel said to defendant, "Mr. Parke need not collect that judgment till Tuesday;" which day would be the 9th of February. On the 8th the garnishee process was served on the defendant. It seems that the consent of Everett & Rawlins' counsel to defer collection of the judgment against Bolles was made under the belief that Bolles' property was secured by the Marshal under the writ of execution.

If a complete legal levy was made by the Marshal, and the execution satisfied in full, there is no doubt that the garnishee, Bolles, would have to be discharged, for there would then be no "goods or effects" of Everett & Rawlins in his hands, nor would Bolles be any longer "indebted" to them, and the garnishee should not be compelled to pay his debts twice. It is also clearly settled that the property or money in the official possession of the Marshal, if he had collected the judgment, would be exempt from garnishment, as being in the custody of the law.

It is therefore necessary to decide whether in fact the Marshal did make a legal levy before the 8th February.

Section 1022 of the Civil Code reads as follows: "Every levy by an officer, in pursuance of a writ of execution issued by any Court, or justice, shall be made by taking the property levied upon into his possession, care and guardianship, and in his option, by removal of the same to some place of security. The officer shall make an inventory of the property levied upon."

It is an essential ingredient of a levy that the property levied upon be taken into the possession, care or guardianship of the officer. He must have the property in his power and control. In this case the property of the defendant was not taken into the possession, care or guardianship of the officer. The Marshal did not designate any of the goods or merchandise of the defendant as taken into his possession. He did not leave a keeper in charge, nor make an inventory, or exercise any act of possession or guardianship over the property. In fact, Bolles'

possession of his goods remained complete, and he was free to sell all the merchandise in his store, without hindrance so far as anything the Marshal had said affected him, for the Marshal, not having specified any goods as taken to satisfy the execution, could not afterwards say that any of the goods sold by Bolles were those he had levied upon. I regard the words of the statute, requiring an inventory to be made of the property levied upon, as mandatory, and as essential to every levy of personal property. The reason of this requirement is obvious: "It should be known to others who may take posterior executions, or who may deal with the debtor, what property is affected by the lien and what is not."

Barnes vs. Billington, 2 Wash., C.C. 38.

It is true that by our code a judgment is a lien on the movable property of the defendant in execution, but it is only such from the time of levy; and if no levy be made the judgment is no lien. The Marshal must take possession of the goods in such a manner as to apprise everybody of the fact, though the removal of the goods to some place of security is optional with him.

No levy then having been made by the Marshal, the debt of Bolles to Everett & Rawlins was still existing and not paid at the time of the service of the garnishee process on Bolles.

The question remains, whether a judgment debtor can be held as garnishee of a judgment creditor. The authorities differ on this point. In Massachusetts it has been held that a judgment debtor cannot be held as a garnishee. 2 Mass. 91; 4 Mass. 170; and Judge Story adopted this principle in *Franklin vs. Ward*, 3 Mason 136, and it has been held in New Jersey and Arkansas.

Drake on Attachment §641, is my authority that the Courts of Connecticut, Pennsylvania, Delaware, Mississippi and Indiana (whose reports we do not possess) hold the contrary doctrine.

In *Gager vs. Watson*, 11 Conn., 168, the following language is used: "A judgment debt is liquidated and certain; and in

ordinary cases, little opportunity or necessity remains for controversy respecting its existence, character or amount. The policy of our laws has ever required that all the property of a debtor, not exempted by law from execution, should be subject to the demands of his creditors." The language of our Garnishee Statute, Sec. 956 Civil Code, is, "where debts are due from any person to a debtor, any creditor may bring his action, * * * and every debt due from such debtor to the defendant shall be secured in his hands to pay such judgment as the plaintiff shall recover," etc. In my opinion, judgment debts are embraced in the term "debts which are due," and I see no reason why judgment debts cannot be secured by the garnishee process as well as any less certain class of debts.

Both the execution and the writ of garnishment issuing from the same Court, to wit, the Supreme Court of this Kingdom, though one from the equity and the other from the law side of the Court, there is no conflict of jurisdiction. If, however, the decree in the case of *Everett & Rawlins vs. Bolles* required the payment of the money into Court for distribution by the Court or further adjudication, a garnishee process would not secure it, for the Court making the decree would not allow its decrees to be thus interfered with. The judgment in this case merely decreed payment of a certain sum by the defendant to the plaintiffs.

It is claimed by the plaintiffs' counsel that, as the judgment debt is owing to Everett & Rawlins jointly, it cannot be garnisheed to pay the debt of one of them.

The following authorities sustain the proposition that a debtor to a partnership cannot be held as garnishee of one of the co-partners: 19 Me. 42; 6 Mass., 271; 9 Mass., 490; 18 Pick., 451. I regard this as reasonable and just, for until all the partnership concerns are ascertained and adjusted, it is impossible to know whether a particular partner be a debtor or a creditor of the firm.

The motion for the order to show cause alleges that the plaintiffs were co-partners.

The bill in equity, under which they took a judgment against Bolles, alleges that they were joint owners of the schooner *Kamaile*, in the proportions of three-fourths in Everett and one-fourth in Rawlins, and the judgment in their favor was from the proceeds of sales of said schooner and oil taken by her.

Owners of a vessel are not co-partners either in the vessel itself or in its earnings, but are tenants in common. 6 Pick., 120; 9 Johns., 469; 2 Johnson's Cases, 329. As the amount of money secured in the hands of Bolles, garnishee (\$309), is not more than three-fourths of the joint judgment debt, \$848.83, it is a good garnishment. Rule discharged.

A. S. Hartwell, for plaintiffs.

The Attorney-General, for the Marshal.

W. C. Jones, for Bishop & Co.

Honolulu, March 5th, 1875.

C. R. BISHOP *vs.* EDWARD EVERETT *et al.*

ASSUMPSIT. BEFORE JUDD, J.

MARCH, 1875.

Taking of testimony, on collateral facts involved upon demurrer, allowed, under Sections 1112, 1113, Civil Code.

Part-owners of a vessel held to be partners.

Garnishee process cannot hold debt of garnishee to a partnership, in an action of assumpsit against one of the partners for a private debt.

Demurrer sustained.

DECISION OF JUDD, J.

This is an action of assumpsit on a promissory note, upon which summons and garnishee process against B. F. Bolles were issued February 8, 1875, and service made the same day. The defendant Everett filed, on the 10th February, a demurrer admitting his indebtedness to plaintiff, but setting up that as

the judgment-debt was owing by Bolles, garnishee, to *him* and one W. J. Rawlins jointly, being co-partners, the garnishee process cannot secure it to pay the debt of Everett alone. Issue being joined on the demurrer, the Court, under Sections 1112 and 1113 of the Civil Code, took testimony as to whether Everett and Rawlins were co-partners.

BY THE COURT.

I am of the opinion that testimony is admissible as to whether Everett and Rawlins were co-partners in the transaction whence this judgment-debt in their favor arose, as Section 1113 of the Civil Code authorizes the taking of testimony on the collateral facts involved upon a demurrer.

The liability of Everett to Bishop is the main point in the case; the existence of the co-partnership between Everett and Rawlins is a collateral fact raised by the demurrer, and which is decisive of the question whether the garnishee can be charged. As already decided in *Everett vs. Bolles, ante*, page 153 (on order to the Marshal to show cause), the garnishee process will not secure a debt owing to a co-partnership to pay a claim against one of a firm, for, as there stated, it cannot be made to appear until the co-partnership concerns are adjusted, whether an individual copartner be a creditor or a debtor of a firm.

Story defines a copartnership to be a "voluntary contract between two or more competent persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of profits between them."

Lindley on Co-partnership, Section 12, says: "An agreement to share profits and losses may be said to be the type of a partnership contract."

With this definition in mind, do the facts show the relation of partners between Everett and Rawlins?

It appears from the records of this Court that the judgment in their favor was from the proceeds of the schooner *Kamaile*, owned by E. Everett and W. J. Rawlins, and of the oil taken by the vessel in a whaling voyage.

It is contended on the part of the plaintiff that part owners of vessels are not partners.

Story on Partnership, Section 417, says that part owners of vessels, in the absence of all stipulations to the contrary, become tenants in common of the vessel, and not joint tenants—that is, there is no survivorship, and each part-owner can sell only his own share.

Story says further, Section 441, Partnership, that “there is little doubt that part-owners of a ship, who purchase a cargo and engage in a common voyage and adventure upon the joint account and profit of all concerned, have a lien for all disbursements and advances, as well as for their share of the profits, upon the property employed in such voyage or adventure and its proceeds; for, as to such voyage or adventure, they are treated as partners and not merely part-owners.”

Lord Hardwicke, in *Doddington vs. Hallet*, 1 Vesey, Sr., sustained this lien; but it was overruled by Lord Eldon in *Ex parte Young*, 2 Vesey & B. But later, Lord Tenterden in *Holderness vs. Shackles*, 8 B. & C., 612, adopted Lord Hardwicke’s view.

Parsons, in his 1 Maritime Law, page 102, says the cases on this subject “are in irreconcilable conflict,” and thinks that “a part-owner *as such* has no lien whatever; but acquires such a lien when any of the elements of partnership (or agency with bailment) upon which a lien may vest, enter into his relation with the other part-owners.”

In the many cases which have been cited by counsel, but which I will not repeat here, the principle seems to be clearly settled that where the facts in any case of shipowners disclose a *partnership*, the existence of a lien results from it as a necessary consequence, according to the principles of all co-partnerships.

In the case before me, it is in testimony by Captain Peterson, that Rawlins put some \$1,700 in the schooner Kamaile and her outfits, on the understanding that he was to receive a share of the proceeds according to the amount invested after *paying the bills*; and the witness said that by “proceeds” was meant “what was left after the voyage was settled.”

I understand this to mean an agreement to share in the profits of the adventure, which, according to definitions above given, constitutes a partnership.

The case of *Bulfinch vs. Winchenback and Trustees*, 3 Allen, 161, is in point. The head note reads: "If two persons agree together to prosecute a voyage in a vessel jointly, each contributing services and time, and sharing in profits and losses, they are partners; and freight earned in a voyage so prosecuted cannot be attached and held by a trustee process against one of them alone."

It seems to me that justice as well as public policy requires that all such cases be treated as *quasi* partnerships with reference to the intended voyage or adventure, for each co-owner being liable *in solido* for all the expenses, repairs and outfits of a ship, it is but right that a part-owner, paying out more than his share, should be allowed to reimburse himself from the proceeds of the adventure before any private debt of one owner be paid.

Demurrer sustained.

W. C. Jones, for plaintiff.

A. S. Hartwell, for defendants.

Honolulu, March 16, 1875.

SUSAN P. MOKUAI *et al.* vs. ISAAC HART KAPUNIAI.

IN EQUITY. BEFORE JUDD, J.

APRIL, 1875.

In a suit for injunction against proceedings at law to enforce a judgment, held: that a bill in equity is an "action," and an alleged gift of lands "a contract for sale of lands," within the Statute of Frauds: and said gift being by parol, the bill must be dismissed.

DECISION OF JUDD, J.

The evidence in this case is mainly that taken in an action of ejectment brought by Isaac Hart Kapuniaia against Kekupu, the

widow of Paihewa; see 3 Hawn., 560. In that case the defendant resisted the suit, and offered evidence to show the contents of a lost deed of gift of the premises in question from Kapuniai (now deceased), the present defendant's devisor, to Paihewa (now deceased), the present plaintiff's father, and under whom she claims. The Full Court found that the evidence in the former suit did not prove the deed. I am asked by the bill in this case to say that the same evidence establishes a transfer of the land by parol, and to enjoin the defendant from bringing any actions at law to dispossess the plaintiff.

The bill submits that it is immaterial whether the said grant was by parol or by deed.

I have carefully re-examined the evidence in the former case as well as the new testimony taken, and am no more convinced now than I was then that there was any transfer or alienation of the property in question from Kapuniai to Paihewa.

As stated in the decision in the former case, "the frequency with which the Hawaiian occupies the land of a near relative or friend and builds his house upon it without having any other right in the land than a mere permissive occupancy, takes away from such occupancy the significance that it might have in other communities."

The counsel for the defense raises an objection to the testimony as tending to show an oral gift of the land, and contends that it is inadmissible by our Statute of Frauds, which reads: "No action shall be brought or maintained upon any contract for the sale of lands, tenements or hereditaments, or of any interest in or concerning them, unless the promise, contract or agreement, upon which such actions shall be brought, or some memorandum or note thereof, shall be in writing, and be signed by the party to be charged therewith or by some person thereunto by him lawfully authorized."

I am of the opinion that a bill in equity is an "action;" and that the gift of the land sought to be established is a "promise, contract or agreement for the sale of lands," for though the consideration may have been "natural love and affection," yet

it is a contract which, if enforced, will result in effecting a verbal transfer of real estate without writing, which the statute forbids.

Browne Stat. Frauds, pp. 4 and 5.

Carrington vs. Roots, 2 Mees & W., 248.

The bill must, therefore, be dismissed; but, as the plaintiff's father many years ago built a house upon this land, and as it is testimony that it is not in a condition to be removed, an order of reference may be taken out to a Master of this Court to ascertain its value, and upon the coming in of his report a decree will be made adjudging the amount which the defendant must pay before the injunction to stay the execution in the suit of Isaac Hart Kapuniai *vs.* Kekupu be dissolved.

A. S. Hartwell, for plaintiffs.

S. B. Dole, for defendant.

Honolulu, April 1, 1875.

J. R. WILLIAMS *vs.* C. T. GULICK, Executor of H. H.

Sawyer, deceased.

IN EQUITY. BEFORE ALLEN, C.J.

NOVEMBER, 1875.

In an action for accounting of partnership transactions, held, that a sale by one partner, of all the partnership property, dissolved the partnership; and as this suit was not brought within six years thereafter, it is barred by the Statute of Limitations.

Bill dismissed.

DECISION OF ALLEN, C.J.

The bill of complaint sets forth that on or about the month of January, 1860, the complainant entered into co-partnership with the defendant in the business of graziers and cattle dealers, and articles of co-partnership were duly executed by the parties.

It appears by the articles that at the time of entering into the co-partnership, to wit, on the 23d day of

January, 1860, each party put into the co-partnership stock a certain number of cattle, but unequal in numbers, and the difference was made up by the payment of the sum of \$1200 by Sawyer to the complainant, so that their interests were made equal. And further, it was mutually agreed that said consolidated stock and their increase should continue until said stock should be finally disposed of by the parties, and that the profits should be equally divided, or if loss should accrue in the business, the same should be paid equally. It was further agreed that the co-partnership should continue ten years, unless dissolved by mutual agreement.

The complainant further alleges that the co-partnership business and trade was entered upon and was to be carried on until the co-partnership expired by its limitation of ten years. And the complainant further alleges that the defendant has made sale of partnership property, and demands an account of the partnership transactions.

The answer of the respondent admits the execution of the articles of co-partnership, but avers that in March or April, 1864, the plaintiff sold all the cattle on his run at Waimalu without consulting with defendant, and defendant avers that said sale put an end to said agreement, and further avers that there has been no partnership dealings between them since that time. And he further avers that complainant, after the aforesaid sale of the cattle, left his run at Waimalu and entered upon the business of a sugar plantation, and as he supposed the business was closed, he had kept no co-partnership accounts.

The evidence in this case is not very satisfactory, as neither party kept any accounts. But it appears by the evidence of Mr. Dowsett that he purchased of the complainant 545 head of cattle, being all the herd in the immediate charge of complainant at Waimalu, in 1864. And it appears further in evidence by Mr. Humphreys, that the respondent on July 1, 1865, made an agreement with him to sell him certain lands, and all the property on the same, consisting of pens, fences, houses, farming utensils, carts, ploughs, and all property on said lands, and also

all the interest the respondent had to all cattle, horses and mules, wherever running, branded *J M*, *V-I*, or *71*; *1H*, being the same brand of the cattle sold Dowsett.

Mr. Humphreys further testifies that Sawyer told him that he only sold him an undivided half of the cattle and mules, he adding, "we then came into town and I was introduced to J. R. Williams as being partner, as I was in possession," but he says "I was no partner of Sawyer." He further testifies, "his agreement with Mr. Sawyer was dated July 1, 1865, was to continue till February 1, 1867, and he remained in possession till that time, when he relinquished it, for the agreement was not complied with, by failure to pay according to its terms."

This case was commenced on the 6th October, 1873, and sometime afterwards the respondent died, and the case was revived against the administrator of said respondent's estate. It is especially to be regretted that the case was not tried during the lifetime of respondent.

It does not appear that there were any accounts kept by either party, and no evidence of demand for settlement, notwithstanding the large sales made by each party. It appears that the respondent resumed the possession of all the property which he had agreed to convey to Humphreys, on the 1st July, 1867, and continued in the same till he made sale of the cattle to Mr. E. H. Boyd, on the 11th of January, 1869. This deed, together with the agreement with Humphreys, was placed on record.

It does not appear by the evidence that either party called the other to account after the sale to Dowsett, or after the agreement to sell to Humphreys, or the actual sale to Mr. Boyd.

After complainant sold to Dowsett, he went into the business of the sugar plantation, and it does not appear by the evidence that he rendered any more personal service to the partnership, neither does it appear that he recognized Humphreys as a partner. And the main question is: Was the partnership dissolved by the acts of the co-partners?

After the sale of complainant to Dowsett, and his abandonment of all partnership co-operation, and after the agreement to

sell to Humphreys all the partnership property on respondent's land at Kailua, and it not appearing that there was any partnership co-operation by these parties, it was a strong case of implied consent to dissolve the co-partnership.

Mr. Justice Story, in his work on Partnership, Sec. 272, says: "As to dissolution by tacit renunciation or by implication from circumstances, it may arise in various ways, as by the withdrawal of a partner from the business of the partnership and engaging in other concerns, or by his refusal to act with the other partners in the business, or by his assigning over his share in the partnership, or by his doing any other act utterly inconsistent with the continuing relation of partnership."

It is contended by the counsel for the respondent that the sale to Dowsett, by complainant, and the subsequent sale to Humphreys, by respondent, was a final sale of all the partnership property, and by the very terms of the co-partnership, worked a dissolution. But the complainant contends that the sale by respondent of all his interest in the cattle and mules was conditional only, that the contract was executory and depended on the contingency of payment, which never happened. Possession was given to Humphreys of the property, and he had the full enjoyment of it, and neither of the parties, complainant or respondent, ever exercised any control over the property, and Humphreys continued in possession for the term of two years. The respondent could not impose Humphreys on Williams as a partner, and there was no evidence that this relation existed between them.

A conditional sale of the whole property, surrendering possession of the same to a third party, so that there is no further business of the co-partnership to do, amounts to a dissolution under the articles, as well as by the law which regulates the co-partnership relation. It was the transfer of all the respondent's interest in the partnership property which severed the unity of interest between the contracting parties. *Ketcham vs. Clark*, 6 Johns., 144; *Murray vs. Bogert*, 14 Johns., 318; *Marquand vs. N. Y. Man. Co.*, 17 Johns., 525.

The interest of a partner is liable for his separate debts, and

his creditors can take by assignment, or on execution, but they are entitled to it without the risk of being partners; neither are the solvent partners obliged to continue the partnership for the very good reason that the property of the insolvent partner is taken out of the concern. Respondent had nothing to do as partner at Koolau, neither had Williams at Waimalu. The property being sold, there was nothing further for the partners to do but to settle the business and divide the profits or losses as provided by the articles, and it is to be regretted that they did not make a settlement at that time. A partner cannot, by the assignment of his interest, introduce his assignee into the co-partnership.

It is well settled in England that an act of bankruptcy is a dissolution of partnership; this is by reason of the assignment, which severs the interest in the bankrupt by operation of law. Camp. 448; 5 Vesey, jr., 295.

The partner who made a sale of his interest in a co-partnership would be liable in damages undoubtedly for non-fulfillment of his co-partnership agreement.

I am of opinion that the co-partnership of Williams & Sawyer was dissolved by the act of Williams in the sale of all the cattle under his charge at Waimalu, and his embarking in other business, when taken in connection with the sale of all the partnership property at Koolau by Sawyer, on the 1st day of July, 1865, and as this bill was not brought within six years from that date, my judgment is that the suit is barred by the Statute of Limitations. Bill dismissed, each party to pay his own costs.

W. C. Jones & Edward Preston, for plaintiff.

R. H. Stanley & A. S. Hartwell, for defendant.

Honolulu, November 9th, 1875.

KOA *vs.* KAAHANUI.

BEFORE JUDD, J., IN INTERMEDIARY COURT.

FEBRUARY, 1876.

Under §1478, Civil Code, driftwood, found on or near the shore, belongs to the finder: and the finder is one who not merely sees it, but who exercises some act of ownership.

DECISION OF JUDD, J., ON APPEAL FROM KOOLAULO, OAHU.

I find the following facts in this case: In November, 1875, the defendant, Kaahanui, who lives on the land of Kahana, discovered a log of wood in the sea just off the land of Punaluu, and as soon as it had stranded he took possession of it, marked it with his name, and next day took it out of the sand and towed it to his own place. The log was of foreignwood, was two fathoms long, and is estimated to be worth from \$4 to \$8. The sea of Punaluu is held by the plaintiff, as lessee of Chulan & Co., who are lessees of the owner.

The plaintiff claims the log as being property on his land. The defendant claims it by virtue of Section 1478 of the Civil Code, which reads: "All wood of any description which may drift on to the beach of any part of this Kingdom, shall be the property of the finder, and anyone finding such driftwood may take the same for his own private use, without paying a share to the Government: provided, however, that this section shall not apply to any vessel wrecked or stranded on any part of the shores of this Kingdom." It is claimed that, as this section is under Chap. 34 of the code, which is entitled: "Of certain specific rights of the people," and the section preceding the one under discussion gives to the people on each of the lands the right to take "firewood, house-timber," etc., etc., the right to driftwood should by analogy be confined to the first finder being on the land where the wood is found. However just and proper this limitation might be, I do not feel authorized to

adopt it, as the section itself does not limit the right to the people of the land where the driftwood may strand.

The original law on this subject was passed in 1851, and reads as follows: "An act to grant to the people the free use of the driftwood. Whereas, several places in this Kingdom, particularly the Island of Niihau, are destitute of wood, and the people are suffering for want of the same; therefore, be it enacted by the Nobles and Representatives of the Hawaiian Islands, in Legislative Council assembled: All wood of any description which hereafter may drift on to the beach of either one of the islands shall be the property of the finder, and anyone finding such driftwood may take the same for his own private use, without paying a share to the Government."

The law was altered at the passage of the Civil Code to the text as given first above.

It is clear that the object of the law was to modify the previous usage in this Kingdom of the Government's claiming the driftwood, and to allow it to the finder.

By the old common law of England—"Whatever movables are found upon the surface of the earth or in the sea, and are unclaimed by any owner, are supposed to be abandoned by the last proprietor, and as such are returned into the Common Stock and mass of things; and therefore, they belong—as in a state of nature—to the first occupant or fortunate finder." But wrecks, etc., belonged to the King. 2 Blackstone, Chap. 26.

By the 12th Section of the 16th Chap. of the Penal Code: "Wrecked property, estrays and lost property shall be deemed still in the constructive possession of the owner; and the taking of either of them with felonious intent is larceny. But the taking of derelict property is not larceny."

The effect, therefore, of Section 1478 of the Civil Code, is to declare that all wood of any description, whether native or foreign, which may drift on to the beach of any part of this Kingdom, is derelict of ownership, and therefore may be taken by the finder, whoever he may be. But a "finder" in the meaning of this statute is one who not merely first sees the

driftwood, but who reasonably soon thereafter lays claim to it, and exercises some act of ownership converting it to his private use.

The defendant in this case having done all this, judgment is rendered in his favor.

S. M. Naukana, for plaintiff.

G. Barenaba, for defendant.

Honolulu, February 8th, 1876.

BANKRUPTCY OF F. G. PADEKEN.

BEFORE JUDD, J.

FEBRUARY, 1876.

The escape of a debtor from the Kingdom, to avoid arrest and punishment on a criminal charge, held to be with intent to defraud creditors, and therefore an act of bankruptcy.

DECISION OF JUDD, J.

H. A. Widemann, a creditor, filed his petition February 4, 1876, praying to have one Frederick G. Padeken declared a bankrupt, alleging that the debtor is owing debts to the amount of two thousand dollars, and that he owed petitioner over four hundred dollars, and that the said Padeken had departed this Kingdom on the 15th of October, 1875, with the intent to defraud and delay his creditors.

The restraining order to the Marshal was issued, as was also the order of notice of hearing and directing service on the debtor, returnable on February 25, 1876. At the hearing, due proof of publication was made and the Marshal returned the restraining order complied with, and that he had not served the debtor as he was not in the Kingdom.

Mr. A. S. Hartwell asked leave to appear for H. B. Jackson, and contest the petition, showing to the Court that he had received satisfaction of judgment had in this Court at the last

October term against said Padeken on a writ of execution issued on said judgment at a date subsequent to the alleged act of bankruptcy. Objection being made and argument had thereon, the Court ruled that H. B. Jackson was not a creditor, and his interest in this matter was too remote to admit him as a party, it being merely the liability to be sued by the assignees when elected.

Mr. S. B. Dole asked leave to appear for E. Mikalemi, Haula, Hookano and Kaponu, showing to the Court that on the 15th of September, 1875, they signed three several bail bonds executed by the said F. G. Padeken as principal, as sureties to the same for the aggregate penal sum of twenty-two hundred dollars, payable to W. C. Parke, Marshal of the Kingdom, conditional on the appearance of the said Padeken at the November term, 1875, of the Third Judicial Circuit Court, and that the said bonds were forfeited by the failure of the said Padeken to appear at said Court. Section 969 of the Civil Code was cited, which reads as follows: "Debts not due may be proved before the Justice, allowing a discount for interest, and all persons who are endorsers or sureties for the debtor, or who have demands against him as drawer or endorser of any note, and all who have demands upon any bottomry or respondentia bond, or for a debt that may become due upon any other contingency whatever, may be considered as creditors within the provisions of this article: Provided, that the bill, note, bond or other contract be made by the debtor before the bankruptcy committed, and that the debt demanded thereupon shall become absolute before the final dividend of the bankrupt's estate."

The Court ruled that although this section might give the parties the right to come in and prove their claims, if bankruptcy of the debtor be declared, yet they are not creditors with an interest to protect so as to allow them to contest this proceeding, for it appeared that they had not paid the amounts of the penalties of the bail bonds, nor had they commenced any action to recover the same against their principal.

As laid down in *Bolles vs. Padeken*, 3 Hawn., 664, "the Court

must be satisfied that the intervention of the opposing creditor will serve a useful purpose either in protecting the rights of the applicant or those of the creditors at large."

The appearance of Mr. Hartwell for Dr. Wight, claiming under a deed from Padeken, which might be sought to be annulled by a suit, was denied on the ground that he was not a creditor, and therefore did not come within the above rule.

The Court then took the testimony offered.

PER CURIAM: I find that claims to the amount of over two thousand dollars have been proved against the debtor, *i.e.*: H. A. Widemann on two promissory notes—one for \$368,

one for \$150—which, with interest, amounts to..	\$ 713 60
Bolles & Co.	480 12
J. L. Keaunui, on note	340 00
W. C. Jones, on note	50 00
R. Love, for back rents of property on Hawaii.....	1,160 00
	\$2,743 72

The "act of bankruptcy" relied upon is the departure of the said debtor from the Kingdom with the intent to defraud or delay his creditors; and it appears in proof that the said Padeken was, on the 15th of October, 1875, under two committals for trial at the Circuit Court to be holden on Hawaii in November following—one for larceny and one for receiving stolen goods; and that he had been convicted of larceny, from which conviction he had appealed to the same Court. He was, therefore, under three criminal charges when he absconded this Kingdom secretly, and was next heard from in San Francisco by letter under date of November 18, 1875.

In order to constitute the departure from the Kingdom an act of bankruptcy, it must be with intent to defraud or delay his creditors.

The circumstances under which this debtor has departed this Kingdom should be considered. He escaped in order to avoid arrest and imprisonment, and has put himself in a position which makes it impossible for him to continue his business,

and so his creditors will, of necessity, be defrauded or delayed. The immediate object of his departure from the Kingdom was not the defrauding or delaying his creditors, yet, as the departure was to avoid imprisonment, it is extremely improbable that he will ever return, as it is to be assumed that no man willingly suffers imprisonment when he can avoid it. The necessary and natural consequence of his act being to defraud or delay his creditors, he must, in law, have so intended it.

See *Fowler vs. Padgett*, 7 Term R., 509: citing *Woodier's Case* and *Raikes vs. Poreau*.

I therefore adjudge and decree Frederick G. Padeken to be bankrupt.

W. C. Jones, for petitioner.

February 28, 1876.

ESTATE OF HER ROYAL HIGHNESS KEKAULUOHI,
Deceased.

IN PROBATE. BEFORE JUDD, J.

MARCH, 1876.

To authorize probate of a lost will by parol proof of its contents, the evidence must be strong, positive and free from all doubt.

The effect and history of "Kauohas" considered, with reference to ancient Hawaiian law and custom.

An award of the Land Commission, made after the date of an alleged lost will, is conclusive against the right to prove such will now, if the will differs from the award.

Probate refused.

DECISION OF JUDD, J.

This is an application by H. H. Chas. Kanaina, for the probate of the will of Her late Highness M. Kekauluohi, Premier, alleging that said will was destroyed after her death, and praying that it be established upon proof of its contents. It is proved that Her Highness died on the 7th June, 1845; that

she left an only son, William Charles Lunalilo, who became King in 1873 and who died in 1874, devising his property to the petitioner, his father. The following is the will sought to be established as propounded in the petition:—

1. I bequeath all the estate formerly of Kaikioewa, to Moses, son of Kinau and Kekuanaoa.

2. I bequeath all the estate formerly of Hoapilikane, to Lot, son of Kinau and Kekuanaoa.

3. The estate of Kinau is to go to Victoria Kamamalu, the daughter of Kinau and Kekuanaoa.

4. I bequeath all my own estate held in my own right to my own son Lunalilo.

5. That if Moses or Lot should die before Victoria Kamamalu, then she shall inherit their property.

6. That if Lunalilo should die first, then the children of Kinau shall inherit his property.

7. That if Moses, Lot, and Victoria Kamamalu should die before Lunalilo, then he shall inherit all their property hereby bequeathed.

8. That Alexander Liholiho, son of Kinau and Kekuanaoa, was to take nothing as he was to inherit the throne.

Four witnesses have been examined to establish this will, viz: Auwai, Kilinahe, Kamaipuupaa (w.), and S. M. Kamakau; the three former claim to have been present at its execution; but before considering their testimony it is necessary to examine the principles of law applicable to the proof of lost wills.

It is laid down by Swinburne, and adopted by later text writers, "that if a testament be made in writing, and afterwards lost by some casualty, if there be two unexceptionable witnesses who did see and read the instrument written, and do remember the contents thereof, the two witnesses so deposing to the tenor of the will are sufficient for the proof thereof in form of law:" and

In 1 Williams on Executors, p. 312, the following comment is made: "And, at this day, it is quite clear that the contents or substance of a testamentary instrument may be thus

established, though the instrument itself cannot be produced, upon satisfactory proof being given that the instrument was duly made by the testator, and was not revoked by him, for example, either by showing that the instrument existed after the testator's death, or that it was destroyed in his lifetime without his privity or consent."

The following is the note to Redfield on the law of Wills, p. 348: "The practice of the American Courts of receiving parol evidence of the contents of a lost will, seems to be universal, and without question, notwithstanding the stringent statute requirements in regard to the mode of executing wills, and a lost will may be established by the testimony of a single witness, notwithstanding the statute requires the execution in the presence of two or more. But this evidence must come from witnesses who have read the will and whose recollection of its contents is trustworthy."

In *Davis et al. vs. Sigourney*, 8 Met., 489, Wilde, J., says: "To authorize the probate of a lost will by parol proof of its contents depending upon the recollection of witnesses, the evidence must be strong, positive, and free from all doubt. Courts are bound to consider such evidence with great caution, and they cannot act on probabilities." In this case the witness was the attorney who drafted the will, but as he could not testify with absolute certainty as to some parts of it, the Court refused to establish it.

None of the witnesses produced in this case at bar ever read the will. Auwai says he heard the King read it before signing it; Kilinahe says Kuluwailehua read it, and he also says that the King read it; and S. M. Kamakau says that he heard it read in the Legislative Council after the Premier's death; Kamaipuupaa says she heard it read in the presence of the testator. A strict ruling would fully justify the refusal of the probate of the will on the ground suggested, that is, that no one witness testifies from actual recollection of its contents, but from recollection of what was said to be its contents by the reader. The fact, however, that the King was the reader, as

testified to by one witness, would repel the possibility of a motive for a false reading of it to the testator (herself the highest chief then living), and it having an important bearing as a state document; and I, therefore, in view of the peculiar circumstances of this case, do not rule that the witnesses must have actually read this will in order to be allowed to testify as to its contents.

Let us see, however, if the evidence bears the test of being "strong, positive, and free from all doubt."

Auwai says the will was made one month before Kekauluohi died, and that it was signed three or four days before her death in the presence of the King, John Young, and the young chiefs, who were sent for from school, and that Kamehameha III. and John Young then signed it.

Kilinahe says the young chiefs were not present, and that the King and Mr. Young signed it a few days after the testator signed it, and that she died a few weeks after signing it; Auwai, Kilinahe, and Kamakau agree that the will left the property of Kaikioewa to Moses, the property of Hoapilikane to Lot, and her own property to her son Lunalilo; Auwai and Kilinahe agree that the will left the property of Kinau to Victoria, and Kamakau says that it left the estate of her own family to Victoria and Lunalilo, that is, that Lunalilo and Victoria were to divide the family (or Kinau) property equally, but that her own property was to go to her own son. Auwai says that the will directed as follows: "Regarding Moses, Lot and Victoria, if either of them die the others were to inherit, and if Lunalilo died first they were to inherit." He adds that when Kamehameha III. came in "Kekauluohi told him that if Moses, Lot and Victoria died, then Lunalilo was to inherit," but he does not assert that the will contained these words.

Kilinahe says the will provided that if either Moses, Lot or Victoria died, then each would inherit from the other; if they all died before Lunalilo, he would inherit all; if Lunalilo died first, they would inherit.

Kamakau says that if any one (of the four) died, the others would inherit; if all but one died, he would inherit.

The above statments of the recollection of the different witnesses vary so essentially from each other, that I am at a loss to say what were the actual terms of the will, and I do not feel at liberty to cull out the testimony where it happens to coincide, and from these fragments frame a will. Using the caution which Courts are bound to exercise in such cases, I cannot act upon the probability that the recollection of Kilinahe and Auwai, servants of the family, are any more likely to be trustworthy than that of Kamakau the historian, whose learning is certainly greater than that of the other two.

Here I must allude to the testimony of Kamaipuupaa, who, while present at the signing in the presence of the King, states that the will left the property of the testator to her son Lunalilo, and that he was the only one mentioned in her will, and that she did not hear any other property mentioned.

Over thirty years have elapsed since the alleged transaction; every one of the parties mentioned and interested in the will propounded have passed away from earth. As a matter of fact, the Land Commission which was organized the same year (1845), did award to Moses the lands of Kaikioewa; to Lot, the lands of Hoapilikane; to Victoria, the lands of Kinau; and to Lunalilo, the lands of Kekauluohi; and they were awarded by distinct titles to the different individuals and "their heirs and assigns," and with no limitation over to the survivor or survivors, as sought to be established by the will. Such a limitation of entailing of these vast estates would be inconsistent with the right of alienation, a right, however, freely enjoyed by all of the above-named young chiefs or their guardians, without objection by the others or their survivors.

It may be objected to, however, that this a proceeding merely to admit a will to probate, not to determine the right of property under it, but I consider the *restrictions* and *terms* of a will as fair matter of comment upon the question of the proof of a lost will, for if they are absurd in themselves, it is a fair inference that they were not in the will. For instance, further, the right assumed by the testator, as claimed in the will propounded, to

devised as her own the property confessedly another's, as the property of Kaikioewa to Lot, is certainly absurd when it is claimed to have any testamentary effect.

Reference, however, to Hawaiian history will show us that such "kauohas" or directions made by a high chief in the expectation of death were highly regarded, and as in the nature of advice, which were given effect according as the King, after discussion with the chiefs, considered the instructions to be reasonable, and such a "kauoha" was equally regarded whether purely oral or reduced to writing.

This leads me to a point made by the counsel for the contestant, that is, that if it be admitted that the contents of the will are shown, this will has been already proved by a court of competent jurisdiction, as it was presented to the Legislative Council in 1845, and, as testified to by Kamakau, "its provisions were carried out," which corresponds to what is now known as admitting a will to probate.

The law on the subject was the Act of 24th of April, 1841, "Respecting parental duties." "When he (the parent) dies, the heir shall exhibit the will to the King, and if the Supreme Judges perceive there was a real fault in the will, they shall correct it," etc.

The Supreme Judges were, by the Constitution of October 8th, 1840, the King, the Premier, and four persons chosen by the Representatives, but I find that in 1845, M. Kekuanaoa, then Governor of Oahu, and Judge of the Court of Oahu, admitted wills to probate. (*Vide Polynesian*, 1845, Proof of Will of Thomas Pratt.)

It is my opinion that this kauoha of Kekauluohi was not regarded as having any effect as a testament, except so far as it left her own property to Lunalilo, and it was unnecessary for this purpose, for she had but one son and heir, Lunalilo, and it could have no effect, other than as good advice, in passing the lands of Kinau to Victoria, or those of Hoapilikane to Lot, etc.

It was not strictly "admitted to probate," in the Legislative Council of chiefs, as contended for, but it was discussed there,

and carried into effect so far as was deemed advisable, that is, the sentiment prevailed that the young chiefs mentioned should inherit the lands from their respective parents and foster parents as indicated.

In one sense, however, it was admitted to probate, for the only judicial action necessary to be taken upon it was taken, and I fail to find anything in the whole transaction that bears out the idea that this kauoha had the *entailing* clauses in it, as propounded in the petition; but if it did contain them, the King and Council set them aside, for these were never carried out.

That the Legislative Council did settle or take action upon the property of high chiefs is clear, for the *Elele Hawaii* newspaper of June 3, 1845, contains a notice of the settlement by the Legislature of the property of Governor John Adams (Kuakini), by which they determined that his private property should go to his heir Leleiohoku, in accordance with his kauoha (will), and that his cash \$20,000 should go to Kekauluohi, Kamehameha III., and the young chiefs Liholiho, Lot, Moses and Victoria. Also, notice of the settlement of the property of Haalilio by the Legislature, that it should go to the King as his heir, and that the King should give Haalilio's mother \$20 per month during her life.

I refer to these newspaper accounts, in default of the records themselves, which counsel, after search, were unable to find.

The *Polynesian* of June 21, 1845, in an obituary notice of the deceased Premier, says that "she had a large amount of property in her hands, the most of which she held as guardian for her niece, Victoria Kamamalu. Her own estate, however, was considerable, the whole of which she bequeathed to her son."

But the Land Commission was authorized by law to "investigate, confirm or reject all claims to land arising previously to the tenth day of December, 1845," and as the will in this case vested the property at the date of the death of the testator (the 7th of June, 1845), the action of this Commission in awarding the lands as mentioned above without the entail to the survivors is conclusive against the right to prove a will *now* which would divert the property differently than awarded.

Their action was a judgment of a Court of competent authority upon a matter within its jurisdiction, it being a "claim for land arising previously to December 10, 1845." *Kanaina vs. Long*, 3 Haw., 332; *Kahoomana vs. Minister of Interior*, *Ib.* 635.

But the case of *Estate of Kaniu*, 2 Haw., 82, is referred to by the counsel for the petitioner. In this case Justice Robertson admitted a verbal will to probate, made in 1843, and although the land the testator had had been awarded to Kinimaka, and not to the devisee. I cannot believe that the attention of the learned Justice was called to this point, or he would not have thus practically set aside an award of the Land Commission of which Board he was a member.

For the foregoing reasons my judgment is, that the will of Kekauluohi, as propounded in the petition, be refused probate.

W. C. Jones, for petitioner.

E. Preston, for contestant.

Honolulu, March 31, 1876.

E. MIKALEMI vs. W. C. JONES, Police Justice.

MANDAMUS. BEFORE JUDD, J.

MAY, 1876.

A Police Justice noted on his record that a party appealed to the Supreme Court. Persons present in Court, including the interpreter, testified that the appeal was expressed to be to the Intermediary Court.

The Court orders the appeal certified to the Intermediary Court.

DECISION OF JUDD, J.

This is an application for a mandamus to compel the Police Justice of Honolulu to grant a certificate of appeal (in the case of *Kahananui vs. E. Mikalemi*,) from his Court to one of the Judges of the Supreme Court, sitting as the Intermediary Court for the Island of Oahu.

It seems that the Police Justice, after repeated continuances of the case at the request of the defendant Mikalemi, finally heard the case and gave judgment in favor of the plaintiff on the 15th day of February, 1875. Thereupon Mr. Keliipio, the defendant's attorney, noted an appeal, and he says it was noted to one of the Justices of the Supreme Court, sitting in place of the Circuit Court of the Island of Oahu. The Police Justice, however, noted it in his record as an appeal to the Supreme Court, and the Deputy Marshal, who keeps the costs account, noted it in his book to the Supreme Court. The case went, accordingly, on to the calendar of the Supreme Court for the April Term, 1876, and on the opening day of the term, Mr. Green, counsel for the plaintiff, moved a continuance, for the reason that his client had met with an accident and could not attend. Mr. Keliipio being present, consented to the continuance, and explains his apparent waiver of the objection now made, by stating that he had not met his client Mikalemi since the trial in the Police Court up to that day, and he supposed that his client had perfected the appeal to the Supreme Court without his knowledge.

On the 18th April, 1876, the appeal to the Supreme Court was dismissed, as no bond for costs had been filed as required by the statute.

The petitioner in this case put in the testimony of Holokahiki, Akepo and Aumai, who swear that they were present in the Police Court at the time when the appeal was noted, and though they use various and untechnical terms in describing the Court to which the appeal was, as they understood it, taken; yet, I must take them as intending the Appellate Court—a Justice of the Supreme Court sitting as the Intermediary Court for the Island of Oahu, under the Act of 1874.

Mr. Wilcox, the interpreter of the Police Court, also understood the appeal to be taken to the same Court.

Although I dislike very much to make any ruling that would contradict the written memoranda taken in good faith at the time, yet as there is a grave doubt as to the correctness of these

memoranda, I prefer to give the party appealing the benefit of this doubt, deeming that the interests of justice will be better subserved in this way.

The rule may be made absolute without costs.

L. Keltipio, for petitioner.

J. P. Green, for the respondent.

Honolulu, May 8th, 1876.

T. H. DAVIES *et al.* *vs.* H. HACKFELD & CO.

TROVER. BEFORE JUDD, J.

MAY, 1876.

The introduction in evidence, by plaintiffs, of an unrecorded contemporaneous memorandum, contradicting a recorded lease on which defendants relied, held to be a surprise, and a new trial ordered.

DECISION OF JUDD, J., ON MOTION FOR NEW TRIAL.

The following is the affidavit in support of the motion: "Edward Furstenau, of Honolulu, Hawaiian Islands, being duly sworn, deposes and says that he is a member of the firm of H. Hackfeld & Co., the defendants in the above entitled cause; that said defendants at the trial of said cause were surprised by the introduction in evidence by the plaintiffs of a certain unrecorded memorandum contradicting a certain recorded release on which the defendants relied and were advised to rely as a defense, of which memorandum they had no prior knowledge."

That the said defendants were further surprised by the plaintiff's evidence that the date of the alleged auction sale was not the same with the date of their assignment of the mortgage therein filed; and that the fact is that the defendants can show that said sale and assignment were upon the same day, to wit, on the 18th of September. That in consequence of the said surprise, the defendants relying on the defence of said release, were not prepared at said trial to show what is the fact, that

they had entered into possession of said Chung Hoon's plantation and other property on his said plantation, by his consent and on his abandonment thereof, at a date several days prior to the said 18th of September, and that the said property in dispute was their own property placed by themselves on said plantation.

All of which evidence was not produced by the defendants at the trial by reason of their surprise as aforesaid, in connection with the long lapse of time since the case was brought.

BY THE COURT.

The defendants had a right to rely upon the recorded bill of sale and assignment, under the defense of showing a paramount title in a stranger. The contemporaneous memorandum introduced by the plaintiffs to contradict the assignment not being recorded, might well surprise the defendants and their counsel, considering the long time that has elapsed since this cause was commenced, and considering the change of counsel for the defendants, consequent upon the re-organization of this Court in 1874.

The defendants may or may not be able to make good the new defense now suggested, that is, of title in themselves, not under the mortgage, but as agents or factors of the plaintiffs' bankrupt. The Court is not called upon to weigh the effect of the new evidence offered, precisely as a jury would weigh it, but to see if under all the circumstances of the case, a new trial would be just and proper. It seems to me that the interests of justice require that the defendants have the opportunity to offer a defense which would not have been necessary if the "memorandum" above referred to had not been produced.

A new trial is ordered, costs to abide the result.

E. Preston, for plaintiff.

A. S. Hartwell, for defendant.

Honolulu, May 18th, 1876.

KAHUKULEIONOHI *vs.* KAIKAINAHAOLE.

EJECTMENT. BEFORE JUDD, J.

OCTOBER, 1876.

No right to bring suit for possession of land can accrue to a plaintiff unless the possession by defendant is adverse.

Although in the early days of this Court administrators held the realty of their decedents, yet after the discharge of an administrator he ceased to have any such authority, and his possession became adverse to the heirs.

DECISION OF JUDD, J.

The Court heard the argument on this case before the jury were empanelled, by consent of both parties.

This is an action of ejectment for the possession of a parcel of land in Kawaiahao, Honolulu. The plaintiffs claim as heirs of Holualoa, deceased. The defendant pleads adverse possession from the time of the death of Holualoa, in the year 1849, to the beginning of this action, and pleads the Statute of Limitations of real actions, of the 18th of July, 1870.

To this the plaintiffs reply that the defendant on the 26th of March, 1849, was appointed administrator of the estate of Holualoa, and that, by the terms of his appointment as such administrator, he took possession of all the real and personal estate of the deceased, including the land in question; that on the 18th of April, 1855, he was discharged as such administrator, but as he credited himself with the tract of land in question in his accounts as presented, he must be deemed as holding the land as trustee for the heirs, and therefore his possession is not adverse to the plaintiffs. The act limiting the time within which actions may be brought to recover possession of land, it is contended, does not require that the possession of the defendant shall be adverse. Section 1, of said Act, reads: "No person shall commence an action to recover possession of any lands or make an entry thereon, unless within twenty years after the

right to bring such action first accrued;" now, unless the possession of the defendant is "adverse," no right to bring an action for the possession could accrue. The plaintiffs claim that the defendant took possession of the real estate in a fiduciary capacity. The defendant claims that the administrator never held the realty. I am of opinion that in 1849 the Superior Court gave such an authority to administrators, and our records show that this authority was freely exercised. But in 1855, the administrator, whatever authority he might have had over the land in consequence of his trust, from the moment of his discharge ceased to have any such authority, and from this time his holding of the land was adverse to the heirs of Holualoa. At this time then their right of action first accrued. A case in point is *Wilmerding vs. Russ*, 33 Conn., 67. The Statute of Limitations then commenced to run. It is claimed that on the 28th of June, 1862, such an action was brought against the defendant as interrupts the operation of the Statute of Limitations; and that likewise in December, 1875, another action was brought for which a like effect is claimed. Both of these proceedings are applications by alleged heirs of Holualoa against defendant, as administrator of said estate, claiming that he should account to them for the real estate in question, and in both of these cases the Probate Courts to whom these petitions were addressed came to the conclusion now arrived at, to wit: that the administrator having been discharged of his trust, the Probate Court had no further jurisdiction over him. These proceedings cannot be held by any refinement of meaning to be actions to recover possession of lands, and therefore do not interrupt the possession. By the records of the Superior Court in 1849, there appears a good deal of evidence that Holualoa made a verbal will of his property to the defendant Kaikainahaole. Such verbal wills were recognized by the Courts in those days, and though by the terms of the defendant's appointment as administrator he was authorized to take charge of the real estate, this trust is not inconsistent with his claim as devisee under the verbal will. This evidence should go to the jury as

tending to show that his claim was adverse, at least, from the time of his discharge. It was claimed at the argument that some of the plaintiffs have been under disabilities, which would postpone the operation of the statute; as this is not admitted by the pleadings, an opportunity must be afforded to show this to the jury. The replication is overruled, and the issues remaining open may go to the jury.

W. C. Jones, for plaintiff.

A. S. Hartwell & S. B. Dole, for defendants.

Honolulu, October 18th, 1876.

WAILUKU SUGAR CO. *vs.* H. A. WIDEMANN *et al.*

APPEAL FROM WATER COMMISSIONERS. BEFORE JUDD, J.

OCTOBER, 1876.

An award of Commissioners of Water Rights set aside, it appearing to be founded upon the idea that the land in question was a Lele of an Ahupuaa, and had the right to water from the Ahupuaa, which is not proved.

DECISION OF JUDD, J.

This is an appeal by the respondents, proprietors of the Wailuku Sugar Plantation, from a decision of the Commissioners of Water Rights of the district of Wailuku, Island of Maui, rendered October 15th, 1875, which decision is as follows:

"That the lele formerly belonged to the father of Kaleo, and now the property of the Wailuku Sugar Company, and containing about six acres, is entitled to water from the Waiehu stream or ditch running on the south side of the Waiehu Valley, and that said piece or parcel of land shall be watered on the Wednesday of each and every week from said ditch, and as soon as the land is watered the water to be turned into the said stream or ditch for the use of others, and no other land belong-

ing to the said Wailuku Sugar Company shall be watered from said stream or ditch flowing from the Waiehu Valley."

This appeal was taken to the Supreme Court in banco, and owing to the First Associate Justice being one of the respondents, and the absence of the Chief Justice, it was agreed to submit the case to the final decision of the Second Associate Justice.

Further testimony was taken at Wailuku on this appeal on the 13th June, 1876, and the argument was had on the 22d July.

It was agreed at the argument that the plaintiffs purchased the land, the right to use water on which is the subject matter of this controversy, on the 19th July, 1864.

The respondents contend that the land in question is described as "kula" land in the award, and therefore took no water by the grant; and the plaintiffs contend that the decision of the Commissioners should be sustained because this land is a "lele" of the Ahupuaa of Waiehu, and therefore entitled to water. But the title itself, to wit, the Land Commission award, would show these facts, if they were true, but it is not in evidence; it is therefore impossible to consider the positions taken.

The testimony of the witnesses seems to me to prove quite clearly that this land was anciently watered from the Waiehu stream, as the water-lead and the kalo patch banks on it would indicate, but that it had not had water used on it for the purposes of irrigation for a period of over twenty years previous to its sale to the plaintiffs in 1864, and that the specific use and appropriation of the water on this land since this date has been less than twenty years.

But there is no testimony in this case as to whether, within the period (before 1864) while the right to use water on this land was not exercised, there has been an adverse enjoyment of this water by the respondents or other lower proprietors, in consequence of the non-user, against which it would be inequitable now to enforce the old easement.

In order, also, to settle satisfactorily whether the use of water for the purposes of irrigation is, in an arid climate, a natural want as distinguished from an artificial want (independent of an established prescription) it would depend a good deal upon the question as to whether the party claiming the use of the water for irrigation is a riparian proprietor; now the settlement of the question whether lands upon an ancient but artificial water-course have the incidents of riparian proprietorship would depend largely upon the fact whether such water-course was accustomed to flow uninterruptedly and with the regularity of the natural stream itself; of this there is no evidence.

After patient and anxious study of this case, I have come to the conclusion that the judgment of the Commissioners should be annulled, for it was evidently founded upon the idea that the land in question was a "lele of Waiehu," which, as indicated above, is not proved, and, until proved, the discussion as to whether a "lele" of an Ahupuaa lying outside of its boundaries is entitled to be watered from the Ahupuaa would be idle.

But in setting aside this award of the Commissioners, I do not say that the plaintiffs have no right to use water on this land, nor do I say that this right to water is shown to belong to respondents, or that, by the failure of the plaintiff to show title to it, it belongs to the respondents, for I am unable from want of sufficient testimony to say definitely what the rights of either plaintiffs or respondents are. I am at loss also to ascertain upon what principle the Commissioners based their award of the quantity of water which the plaintiffs might use on this land, to wit, on every Wednesday sufficient to water it—they not having before them as parties the other landowners using water from this watercourse, and there is no testimony as to the amount of water used by the respondents and other parties on their lands below from the same water-course.

The statute says that in settling such controversies the Commissioners shall give such a decision as may in each particular case appear to them to be just and equitable between the parties interested; such decision, however, must be based on evidence.

I consider that the Appellate Court has, under the statute constituting this Commission, the same powers.

My decision is that the award of the Commissioners be annulled; that the plaintiffs use the water on this land as they had been accustomed to use it at the time these proceedings were instituted, and without prejudice to the right of either party to bring a bill or such other proceedings as may be deemed advisable in order to determine the rights of the parties interested.

A. S. Hartwell, for plaintiffs.

W. C. Jones, for respondents.

Honolulu, October 30, 1876.

KAIAWAHAKENA *vs.* MAKAPUU.

IN EQUITY. BEFORE JUDD, J.

FEBRUARY, 1877.

Plaintiff claims a resulting trust in lands, on the ground that he furnished the purchase price and his name was fraudulently omitted from the Royal Patent.

Held, that while there is no resulting trust in favor of a husband, in lands of the wife, paid for with the husband's money; in this case it appears that the wife's name was fraudulently inserted in the Patent, against the will of the husband, and the Court establishes the trust.

DECISION OF JUDD, J.

This is a bill in equity in which the Court is asked to declare the defendant—as the sole heir-at-law of W. Ka, deceased, the said Ka being the heir-at-law of Helela, the plaintiff's wife—a trustee for the plaintiff of certain tracts of land situate in Pauoa, Honolulu, Oahu, described in Royal Patents Nos. 2589 and 2590.

The allegations on which the bill claims this trust to have resulted is the payment by the plaintiff of the purchase-money,

and also that the names of the grantees, Ka and Helela, were ordered to be placed in the Royal Patents instead of plaintiff's name, by Ka, contrary to the plaintiff's instructions, and in fraud of his rights.

An inspection of the patents shows that the name of Ka has been erased in both patents wherever the names of the grantees occur, but the Book of Government Grants, in which these patents are recorded, shows that the patents were issued in the names of Ka and Helela.

The testimony as to who actually supplied the purchase-money consists mainly of statements of witnesses that heard Helela say at the time of the sale that her husband, the plaintiff, furnished the money (\$210), and that she had told Ka to "take this money, pay for the land, and have your father's (plaintiff's) name put into the deeds."

Besides this we have the positive statement of the plaintiff himself that he furnished the purchase-money from his own savings; he also says that Helela told Ka to have the plaintiff's name put in the deeds. Plaintiff says that Helela frequently demanded the deeds of Ka, and that he put her off evasively; that he never saw the deeds until 1868; at this time Ka was in pecuniary difficulties, and he applied to the plaintiff to join with him in signing a mortgage on another piece of land owned by Ka, but on which plaintiff had a house, and plaintiff then demanded these patents; that Makapuu, the defendant, brought them to him, when he discovered for the first time that his name did not appear in them.

Kauahoa says that she received the patents from Ka, and delivered them to Makapuu, and that they read in the names of Ka and Helela, and that no erasure had then been made. It is not clear whether the plaintiff or Ka made the erasure, for Ka, being Helela's own son, she having died in 1867, would inherit from her the whole estate. If he did it, his motive would be a dislike to excite the plaintiff's suspicions on seeing his (Ka's) name appearing on the patent, knowing that his title was not affected by the erasure. On the other hand, if the plaintiff did

it, he may have thought that he was but righting a wrong by removing a name that was there without authority, and he evidently thought, as he afterwards expressed to Mr. Green, that he, and not Ka, was the heir of Helela.

The erasure itself, whichever one made it, would not affect the title, for the Record of the Patents could always be produced to contradict the erasure. I dwell on this in order, if possible, to obtain some light on the question whether Ka fraudulently caused Helela's name to be put in the patents. That he caused his own name to be put in the patents fraudulently I have no doubt. I arrive at this conclusion, not only from the testimony above referred to that the purchase money was supplied by plaintiff, but the other facts which I consider proved, that from the time of the sale the plaintiff took possession of the land, enjoyed its products, had the land assessed to himself, and paid its taxes, and also of Ka's pecuniary inability in 1859 to raise such a sum of money.

The testimony of Kauahoa that plaintiff divided the receipts from this land with Ka, and thus acknowledged Ka's ownership, is unsupported, and it is so inconsistent with the other facts of this case that I cannot believe her.

But why Ka should insert Helela's name as well as his own is not so clear. He had no guarantee that he would survive her, or that she would not devise the land to someone else, and why if he was only willing to commit a fraud for one-half of the land, did he not place the name of the plaintiff in the patents with his own, and not that of Helela?

The doctrine of resulting trusts arises from the natural presumption that he who supplies the money means the purchase to be for his own benefit, rather than for that of another, but it is well settled that where a husband pays for land conveyed to his wife, there is no resulting trust for the husband, the presumption being that it was made for her provision.

In *Whitten vs. Whitten*, 3 Cush., 200, the Court expresses the principle as follows: "The law is clear that there is no result-

ing trust in favor of the husband, from the fact that the lands conveyed to the wife were paid for with the money of the husband."

The mere fact that it was the plaintiff's money that paid for these lands raises no trust in his favor, if he authorized the conveyance to his wife. But the bill alleges "that the plaintiff never authorized the placing of said Ka's or said Helela's name in said deeds. * * * And that the aforesaid acts of W. Ka were fraudulent and void as against the plaintiff, and contrary to good faith, and in violation of his duty as the plaintiff's agent."

The question remains, was this insertion of Helela's name fraudulent? If so, it will rebut the presumption of a provision for the wife.

If it be true that the plaintiff did authorize the conveyances to be made in his wife's name, then his occupation of the land, his enjoyment of its products, his paying its taxes, etc., were all proper and consistent with his rights as Helela's husband during coverture, and since her death this occupation and exercise of ownership may have been undisturbed, either because the parties thought the plaintiff was Helela's heir, or because Ka may not have cared to molest him. But it may be equally true that the plaintiff relied on the position now taken in the bill that he never intended the deeds to be put in his wife's name, and that it was all a fraud upon him.

The same witnesses who testified about the purchase-money, also testify that Helela instructed Ka to have the plaintiff's name put into the deeds as grantee.

It is contended that this testimony is inadmissible on the ground that a wife is not admissible as a witness in a cause in which her husband is a party. 1 Greenl. on Evid., §334. But this bill is brought against the representative of the heir of Helela, and she being the party in interest, her admissions, being against her interest, are binding upon her heirs.

See Greenl. on Evid., §189.

Beveridge vs. Minter, 1 Carr. & Payne, 364.

I am of opinion, though I am not free from doubt, that the testimony shows that Ka wrongfully and against the intention of the plaintiff had the deeds made in his and his mother Helela's names. This is held to rebut the presumption of a provision for the wife's benefit, and the presumption of a trust would arise for the husband. See 1 Perry on Trusts, §148; *Finch vs. Finch*, 15 Vesey, 43; *Livingston vs. Livingston*, 2 Johns. Ch. 537; *Jackson vs. Matsdorf*, 11 Johns., 91; *Perkins vs. Nicholas*, 11 Allen, 542.

Decree accordingly.

A. S. Hartwell, for plaintiff.

J. M. Davidson, for defendant.

Honolulu, February 9th, 1877.

KAEHUKUKONA vs. AHUNA.

COVENANT. BEFORE JUDD, J., IN INTERMEDIARY COURT.

FEBRUARY, 1877.

The Court admits parol contemporaneous evidence to explain a patent ambiguity in a lease, so that the Court may be placed as nearly as possible in the situation of the party whose written language is to be interpreted.

DECISION OF JUDD, J., ON APPEAL FROM POLICE JUSTICE OF
HONOLULU.

This action was brought to recover damages for a breach of contract, in that the defendant has deprived the plaintiff of the use of two certain kalo patches to which he claims to be entitled by virtue of an indenture of lease, dated the 1st July, 1873. The case is submitted on the papers filed and the notes of evidence taken by the Police Justice.

In the lease referred to, the plaintiff demises to the defendant for the term of ten years from the 1st January, 1874, a certain tract of land in Makana, Koolauloa, Oahu, at the annual rental of \$150. After the "In testimony" clause, the following words were written before the execution:

“Koe nae elua loi, 1 no Malia, 1 no Kulaai, i hoolimalima ia e Ahuna.” This would be translated: “Reserving, however, two kalo patches, one of Malia’s and one of Kulaai’s, which are leased by Ahuna.”

It is claimed that as these kalo patches are not the property of the plaintiff, and formed no portion of the estate demised, he could in no sense “reserve” them, especially as they are described in the clause itself as being “leased by Ahuna,” the defendant.

Certainly here is a “patent ambiguity,” for this clause is so defectively expressed that no Court could gather the intention of the parties from it. It is not a “latent” ambiguity, for it is not the case of a clause intelligible in itself, which extrinsic circumstances have rendered doubtful.

The defendant contends that the evidence submitted is inadmissible under the well-known rules that “parol contemporaneous evidence is inadmissible to contradict or vary the terms of valid written instruments,” and that in cases of patent ambiguities, “the declaration of the party cannot be admitted to explain his intention, but the clause will be void for uncertainty.” But to every rule there are exceptions; and to the rules above quoted, a well-known exception is that parol evidence may be admitted of the surrounding circumstances, “so that the Court may be placed, as nearly as possible, in the situation of the party whose written language is to be interpreted.”

1 Greenleaf on Evidence, §295A: “Every deed ought to be so construed, if it can, that the intent of the parties may prevail and not be defeated.” *Worthington vs. Hylyer*, 4 Mass., 205.

It is not until the Court, “placing itself in the situation in which the contracting party stood at the time of executing the instrument, and with full understanding of the force and import of the words, cannot ascertain his meaning and intention from the language of the instrument thus illustrated;” that it is a case of hopeless uncertainty and the instrument inoperative and void. 1 Greenleaf on Evidence, §300.

The evidence, therefore, of a previous lease between the same parties, of the same land, in which Ahuna by a special after-written covenant gives to Kaehukukona the use of those kalo patches of Maluaai's and Maria's, for the full term of the lease, *i.e.*, four years from the 1st of January, 1873, is admissible. And the testimony that plaintiff was in possession of these patches at the time of the execution of the new lease is also admissible, for the evidence is merely explanatory of the circumstances in which the plaintiff was situated with reference to the two kalo patches.

Now, the plaintiff reserved "his houses and their foundations," which were in his possession, and why not reserve the two lois, *i.e.*, the Kaluaai loi and the Maria loi, leased by Ahuna of them, also in plaintiff's possession, and which he was holding as a sub-tenant by virtue of the former lease?

It is not an artistic use of language to apply the word "reserve" to what was not the lessor's property, but he had the right of possession of the property under the former lease, and what he meant was that he should retain these lois as long, of course, as Ahuna's could bind them, that is during the continuation of his leases from Kaluaai and Maria. It was necessary to insert such a provision if he wished to retain them, for he could not continue to hold these lois under the first lease, as the making of the new lease would operate as a surrender of the former one.

The clause retaining these lois expressed, in fact, an additional consideration for the lease itself.

The defendant, therefore, has no right to deprive the plaintiff of his use of these kalo patches, and is liable in damages for so doing.

The testimony shows that the crop of kalo had been taken by the plaintiff from the patches at the time the lease under consideration was made, so the measure of damages is what the use of these lois was reasonably worth, not what he could obtain for them to lease them, but what he could reasonably have made keeping them in his possession and expending his own labor

upon them, remembering, also, that this is not an action to recover their possession.

The estimates of value of these patches do not always agree, and they are not very certain.

Without recapitulating this evidence or commenting upon it, I find for the plaintiff in the sum of \$100 and costs.

A. S. Hartwell, for plaintiff.

R. F. Bickerton, for defendant.

Honolulu, February 12th, 1877.

C. C. HARRIS vs. H. A. P. CARTER, J. MOTT SMITH,
and J. O. DOMINIS, Commissioners of Crown Lands.

EJECTMENT. BEFORE JUDD, J.

MARCH, 1877.

The Mahele of 1848, and ancient Hawaiian land tenures, considered, and defined.

A release by the Mahele from the King to his Queen is good.

Ahupuaa, Ili, and Ili Kuponos, defined.

Although the grant of an ahupuaa ordinarily includes all the land within its boundaries, yet as all the Ilis recognized in the Mahele and awarded by the Commission were undoubtedly *Ili Kuponos*, having their own distinct identity, the Court holds that such *Ili Kuponos* were not included in the grants of the ahupuaas within whose boundaries they lie, it not being clearly expressed or manifestly intended that they should be so included.

Although there is no prescription against the state, the King, as an individual, cannot claim this immunity.

The King did not have to go to the Land Commission for confirmation of his titles in his reserved lands.

DECISION OF JUDD, J.

This is an action of ejectment. The complaint was filed January 20th, 1875, and on the same day service was admitted and the jury waived by the then Commissioners of Crown Lands—J. S. Walker, R. H. Stanley and J. O. Dominis.

On the 20th January, 1877, the present commissioners were substituted as defendants on motion of the plaintiff. The plea

of the general issue was then filed by plaintiff's consent, and the case argued and submitted on the 23d of January.

The plaintiff claims title to the Ili of Kawailoa, in the Ahupuaa of Kailua, Koolaupoko, Oahu, and to the Ilis of Kaluapuhi, Halekou, Kuou, Waikalua, Keaahala, Kahalekauwila, and Kanohouluiwi, in the Ahupuaa of Kaneohe, Koolaupoko, Oahu; and shows in evidence as follows:—

1. The "Mahele" or "Great Division" of 1848, of the Ahupuaas of Kailua and Kaneohe to Hakaleleponi Kalama, the Queen of Kamehameha III.

2. Awards of the Land Commission to Queen Kalama, dated May 20th, 1854, issued April 13th, 1855, upon claim No. 4452, designated as Apanas 12 and 13, for the Ahupuaas of Kailua and Kaneohe respectively.

3. Will of Kamehameha III., who died December 15th, 1854, dated the 2d day of April, 1853, admitted to probate January 27th, 1855, in which the said Ahupuaas of Kailua and Kaneohe are, with other lands, devised in fee simple to Queen Kalama.

4. The admission that Queen Kalama died intestate 20th September, 1870, leaving as her heir-at-law His Highness Charles Kanaina.

5. Deed of Charles Kanaina to the plaintiff, dated 1st of May, 1871, of all the right, title, and interest which the late Queen Kalama possessed at the time of her decease in and to the Ahupuaas of Kailua and Kaneohe.

The plaintiff claims that, by virtue of the above-recited chain of title, Queen Kalama was entitled at the time of her decease to the whole of the Ahupuaas of Kailua and Kaneohe, and to the aforesaid Ili of Kawailoa in the Ahupuaa of Kailua aforesaid, and the said Ilis of Kaluapuhi, Halekou, Kuou, Waikalua, Keaahala, Kahalekauwila, and Kanohouluiwi in the Ahupuaa of Kaneohe, and which are included in and are a part of the said Ahupuaas, and which by deed of C. Kanaina are conveyed to the plaintiff.

It is clear to me that the plaintiff's title is not affected by the fact that the Mahele of 1848 of these lands was made by the

King to his own wife. Kalama was Kamehameha III.'s Queen, but she was also his subject, and so far as this Mahele is concerned, could take direct from the King, her husband, like any other chief.

It is also clear that the title to the Ahupuaas of Kailua and Kaneohe is in the plaintiff.

The principal question remains to be considered, viz: Do the grants of these Ahupuaas include and carry with them the so-called "Crown Ilis," above enumerated? I suppose it will not be questioned that the grant of a tract of land which is described either by survey or in any other sufficiently definite mode, will be held to include all that is within its boundaries. This may be illustrated thus: If a man sells his house-lot, the conveyance will be held to include the fountain or the garden which is in the house-lot.

So a grant of an Ahupuaa will include the grantor's fishponds or kalo patches lying within the Ahupuaa.

The argument is made that an Iliaina is a portion or subdivision of an Ahupuaa, and therefore the grant of an Ahupuaa includes the Ilis lying within its circumscribing boundaries. And this reasoning is applied to the present case as follows: When Kamehameha granted, at the great Mahele, the Ahupuaa of Kaneohe to Kalama, he granted whatever made up that Ahupuaa; that is, all the Ilis within it not granted to other persons.

Here it becomes necessary to examine the nature of the land tenures in this Kingdom, and particularly the great Mahele of 1848. As to the former, the "Principles adopted by the Board of Commissioners to Quiet Land Titles," 2 Hawn. Statutes, p. 81, *et seq.*, furnishes us a clear exposition, and in the investigation of the latter I have been much aided by the decision of the Full Court in 1864, "In Re Estate of His Majesty Kamehameha IV.," 2 Hawn., 715, written by the late Mr. Justice Robertson, our best authority on such matters.

It seems that after long and patient investigation in which the patriotism of the King and chiefs was often severely tested,

it was finally settled and fully established that there were but three classes of persons having vested rights in the lands of this Kingdom. First, the King; second, the landlords, comprising the chiefs and Konohikis; third, tenants, who afterwards became "Kuleana-men." But as each of these classes had rights in most of the lands, in a descending scale, as it were, it became necessary to separate and define the rights of each—or, rather, to partition in severalty to each one his proper share of the whole. It was finally settled that the King should allow the landlord (2d class) one-third; the tenants (3d class) one-third; and retain himself (1st class) one third.

The "Mahele Book," which was put in evidence and which I have carefully studied, is to my mind in effect and substance the record of various deeds of quit-claims between the King on the one hand, and the various chiefs and landowners on the other, of their several interests, each to the other, in the various lands of the Kingdom.

After all these preliminaries were settled, the work began, and the first Mahele was made between the late Princess Victoria Kamamalu (by her guardians) and the King, on the 27th day of January, 1848. This work continued on from one chief and Konohiki to another with the King, taking up one island after another, and going on regularly from day to day, and the last Mahele was signed on the 7th March, 1848.

As an example I copy here the transaction between Queen Kalama and the King, on one page of the Mahele Book, to wit, 146:

KO KAMEHAMEHA III.

Na Aina.	Ahupuaa.	Kalana.	Mokupuni.
"28 different.....	Ilis in Wailuku.....	Puali. Kom.....	Maui.

"Ke ae aku nei au i keia Mahele, ua maikai, Ko ka Moi na Aina i kakauia maluna. Aohe o'u kuleana maloko.

"HAZALELEPONI KAPAKUHAILI. [L.S.]

"Hale Alii, 11 Feb., 1848."

(Translation of the above.)

"I hereby agree to this division; it is satisfactory. The

lands above inscribed are the King's; I have no right to them.

HAZALELEPONI KAPAKUHAILI. [L.S.]

Palace, 11 Feb., 1848."

On the opposite page, 148:

KO HAZALELEPONI KALAMA.

Na Aina.	Ahupuaa.	Kalana.	Mokupuni.
Kula.....	Ahupuaa.....	Puna.....	Hawaii.
Kapalaalaea.....	".....	Kona.....	"
Kalahuipuaa.....	Ili no Waimea.....	Kohala.....	"
Anaehoomalu.....	" ".....	".....	"
Waipio.....	Ahupuaa.....	Hamakua.....	"
Kaohe.....	Ili no Wailuku.....	Puali. Kom.....	Maui.
Puhiawawa.....	" ".....	" ".....	"
Lemukee.....	" ".....	" ".....	"
Puuhala.....	" ".....	" ".....	"
Manienie.....	" ".....	" ".....	"
Waikahalulu.....	" Honolulu.....	Kona.....	Oahu.
Kailua.....	Ahupuaa.....	Koolaupoko.....	"
Kaneohe.....	".....	".....	"
Hakipuu.....	".....	".....	"

Ke ae aku nei au i keia Mahele, ua maikai. No Hazaleleponi Kalama na aina i kakauia maluna; ua ae ia'ku e hiki ke lawe aku imua o ka Poe Hoona Kuleana.

KAMEHAMEHA. [L.S.]

Hale Alii, 11 Feb., 1848.

(Translation.)

"I hereby agree to this division; it is satisfactory. The lands above inscribed are Hazaleleponi Kalama's; she has permission to take them before the Land Commission.

KAMEHAMEHA. [L.S.]

Palace, 11 Feb., 1848.

The Mahele being completed on the 7th of March, 1848, the King's suzerainty over the lands held by his chiefs and other individuals was at an end, and the list of lands in which the interests of the chiefs and lesser Konohikis had thus been released, became the King's.

But the Mahele, as Judge Robertson expresses it in the

decision above referred to, granted the lands to the chiefs "by freehold title, certified to the Land Commission for its formal award, capable of being converted into an allodial title by payment to the Government of a commutation to be fixed in Privy Council."

It appeared to the King that the land thus released to him might be subjected to commutation in like manner with the lands of the chiefs.

To quote again from the decision in 2 Haw., 722: "The records of the discussion in Council show plainly His Majesty's anxious desire to free his lands from the burden of being considered public domain, and also his wish to enjoy complete control over his own property.

"Moved by these considerations and by a desire to promote the interests of his Kingdom, he proceeded with an exalted liberality to set apart for the use of the Government the larger portion of his Royal Domain, reserving to himself what he deemed a reasonable amount of land as his own estate.

"To effect that object he signed and sealed on the 8th March, 1848, two instruments contained in the Mahele Book." The first is as follows:—

"Know all men by these presents that I, Kamehameha III., by the Grace of God, King of these Hawaiian Islands, have given this day, of my own free will, and have made over and set apart forever to the chiefs and people, the larger part of my Royal land for the use and benefit of the Hawaiian Government; therefore, by this instrument, I hereby retain, or reserve ('hookoe' in Hawaiian) for myself, my heirs and successors forever, my lands inscribed on pages 178, 182, 184, 186, 190, 194, 200, 204, 206, 210, 212, 214, 216, 218, 220, 222 of this book, these lands are set apart (or separated off) for me, my heirs and successors forever, as my own property exclusively.

Signed with my name and my seal at Hale Alii, this 8th day of March, 1848.

KAMEHAMEHA. [L.S.]

Signed and sealed in presence of Keoni Ana, G. P. Judd."
I mark this deed "A."

On the opposite page of the Mahele Book the following deed is inscribed, having the same date:

“Know all men by these presents that I, Kamehameha III., by the Grace of God, King of these Hawaiian Islands, do hereby give, make over and set apart forever, to the chiefs and people of my Kingdom, and convey all my right, title and interest in the lands situated here in the Hawaiian Islands, inscribed on pages 179 to 225, both inclusive, of this book, to have and to hold to my chiefs and people forever. These lands are to be in the perpetual keeping of the Legislative Council (Nobles and Representatives), or in that of the Superintendents of said lands, appointed by them from time to time, and shall be managed, leased, or sold, in accordance with the will of said Nobles and Representatives, for the benefit of the Hawaiian Government, and to promote the dignity of the Hawaiian Crown.”

Signed and sealed, etc.

This deed I mark “B.”

This deed was executed the same day as the first one above mentioned marked “A,” and preceded it, as is evident from the allusion to it in the deed “A.” This last deed (B) is the conveyance by the King to the Government of the Government lands. Strictly speaking, the deed marked “A” was not necessary; for, the King being, as Sovereign, the owner of all the lands of the Kingdom, and the chiefs and Konohikis having by the Mahele released their feudatory rights in a large portion of them by name; when he deeded to the Government a portion of these lands, what remained were, of course, his own. But for greater certainty the “deed of reservation,” so called, was made. His title to these lands was complete without this deed of reservation, for the outstanding claims in them were released to him by the Mahele.

On the 7th of June, 1848, the Legislature passed “an act relating to the lands of His Majesty the King and of the Government.” This act will be found in the Civil Code, pp. 374 to 402, both inclusive.

In the case of the Estate of His Majesty Kamehameha IV.,

this act is called merely confirmatory of the King's previous action. "The Legislative Council simply intended by that act to ratify what had already been done by the King in Privy Council, and hereby bind the nation to its faithful observance forever."

Certainly the King's title to his lands does not date from this act of the Legislature.

On page 220 of the Mahele Book, the Iliainas, which are the subject of this suit, are inscribed among the King's lands reserved. In the second volume of the Mahele Book, as it is called, which is, however, but a summary or index of the lands of this Kingdom, arranged by islands and districts, I find on page 98,

Land.	Owner.
Kailua	H. Kalama
Kawailoa	His Majesty

On page 100,

Kaneohe	H. Kalama
Halekou	His Majesty
Kahalekauila	"
Kuou	"
Kanohouluiwi	"
Kaluapuhi	"
Keaahala	"
Waikalua	"

I do not place much importance upon this, as it was but an index compiled in the Interior Office, and is not conclusive as to title, but it has value as showing the views of those in office at the time. I find also by reference to the Mahele Book that the Ilis of Kawailoa and Waikalua were released to the King by Princess V. Kamamalu, 27th January, 1848; Kahalekauwila, by J. A. Kauwa, 11th February, 1848; Keaahala, by Charles Kainaina, 28th January, 1848; Kaluapuhi, by Kahonu, 2d February, 1848; Halekou, by Kapu, 4th February, 1848; Kanohohuluiwi, by Puhalahua, 3d February, 1848; and Kuou, by Kahooahanohano, 10th February, 1848.

From all this I draw the following inferences: That the Iliainas in question were at the time of the Mahele known and

treated as distinct from the Ahupuaa. They had had different owners or Konohikis under the King, and by virtue of the Maheles of the Konohikis, who released their rights in them to the King, and by virtue of the King's deeds of the 8th of March, 1848, in which the private lands of the King were separated from those of the Government, these Ilis thus became absolutely the King's, subject to the rights of tenants (Kuleana men) whose titles were being settled by the Land Commission.

The Mahele Book shows that the King reserved "lands" of all denominations, not Ahupuaas merely, but "Iliainas" as well. Iliainas were treated as separate from the Ahupuaas. In one case, "Wailuku," Maui, all the Ilis were "maheled" to different Konohikis, and only the Ahupuaa remained to the King.

In the Ahupuaas of "Kailua" and "Kaneohe," numbers of Ilis were "maheled" or released to various chiefs and Konohikis by the usual form of Mahele certificate, which directed the parties to "the Land Commission for formal award of the same."

Now, although these maheles were executed day after day until the work was completed, it was because it was too great a task to be all completed in one day, and they might well have all been dated on one and the same day. It was all one act. None of the maheles by the King to any chief could claim by virtue of its earlier date any priority or superiority of title over the mahele by any chief to the King.

The whole work was one scheme; one part was contemporaneous with every other part.

The mahele executed by the King to Queen Kalama of the Ahupuaas of Kailua and Kaneohe, surrendered these lands to her; the various maheles executed by the Princess Kamamalu, Charles Kanaina, and others, of the Iliainas in question, released all their rights in them to the King, who already held the superior title in them as sovereign.

I cannot see, therefore, how, in any manner, the deed of the King of March 8, 1848, formally reserving these Iliainas to him-

self, which we have seen was unnecessary, or the Act of June 7th, 1848, which was merely confirmatory, affected his title to those Iliis in the least. How then could these deeds, or the Act of the Legislature referred to, be construed to revoke or disaffirm the Mahele of the Ahupuaas of Kailua or Kaneohe to Queen Kalama? The King's deed of March 8th, 1848, did not affect these Ahupuaas in the least—it had no reference to them any more than if the Iliinas reserved were situated in other Ahupuaas than these—in other districts than Koolaupoko, or on other islands than Oahu.

I have said there were other Iliinas in the Ahupuaas of Kailua and Kaneohe which were “maheled” to various chiefs and claimants.

They took these maheles to the Land Commission and received their awards for them. If the mahele of the King of the Ahupuaas of Kailua and Kaneohe swept off and included in them the King's Iliinas which were within the limits of these Ahupuaas, the same reasoning would sweep off, in the grant of the Ahupuaas, those other Iliinas, also within the limits of these Ahupuaas, which were “maheled” to those other chiefs.

The subsequent awards of the Land Commission for the Iliinas of the other chiefs would make their case no stronger as against the effect of the mahele of the Ahupuaa to the Queen.

The King could not perfect his own already perfect title to his own Iliinas. No one would seriously contend that the King was obliged to go to the Land Commission for awards or patents of his own lands, even for commutation purposes, when we bear in mind that he had surrendered to the Government by far the greater portion of the lands that remained his, which extinguished completely the Government right to commutation in what was left.

One perfect title is as good as any other perfect title.

The King's title to the Iliinas, which are subject of this suit, was perfect. So were also the titles of those chiefs, who had Iliinas in the same Ahupuaas “maheled” to them, perfect so

far as the King was concerned. They had, of course, to follow the mahele up with an award, and were entitled to Royal Patents on paying the Government Commutation.

When I say that both these classes of titles are "perfect," I must always be understood as qualifying this by the statement that these maheles and subsequent awards were subject to the rights of native tenants. These tenants, on taking out their Kuleanas, paid no commutation to the Government, for the holder of the award of the Ahupuaa or Iliaina, out of which they were taken, settled for the whole Government commutation. In the towns of Honolulu, Lahaina, and Hilo, the awards of Kuleanas for houselots were subject to commutation, there being no superior lord or chief over them whose Ahupuaa or Ili they were included in and whose commutation covered their's. See Principles adopted by the Land Commission, page 84, and *Keelikolani vs. Robinson*, 2 Haw., 547, and *Kanaina vs. Long*, 3 Haw., 332.

I here quote from *Keelikolani vs. Robinson*, as follows: "Under the general rule that the party holding an award or patent for an Ahupuaa is the owner of all the land embraced within its boundaries, except such portions of it as have been awarded by the Land Commission to other persons, it is contended by counsel for the respondent that unless the complainant has shown that Pakaka was awarded by the Land Commission to Leleiohoku or Pitt Kinau, the fee of that lot became vested in the Queen Dowager as a part of Waikahalulu, and that in consequence she, and not the complainant, is now the owner of the right formerly possessed by Kalaimoku and Leleiohoku." "In our opinion upon the Grant of Pakaka to Kalaimoku by Kaahumanu, which was the same as a grant by the King, it ceased for ever to form a part of Waikahalulu, as held by the Konohiki."

I apply this reasoning to the case before me in this way: Upon the execution of the releases by Princess Kamamalu, Charles Kanaina and the others (by their maheles) of their interests in the Iliainas in question, "they ceased forever to

form a part of the Ahupuaas as held by the Konohikis." And our case is even stronger, for the grant of Pakaka by Kaahumanu to Kalaimoku initiated his title—the maheles of Princess Kamamalu and the others but released to the King an outstanding claim in lands in which he already held title as sovereign.

I do not deem it necessary to discuss the question here, whether the Land Commission had the legal authority to put into the land awards issued by them the condition of forfeiture if the Government Commutation was not settled within thirty years, for we are considering the King's title to the Iliainas in question. He had delegated a portion of his authority to the Land Commission to settle his rights as the Chief Executive of the Government in other lands with the claimants, but he did not go to the Commission for an adjudication of his own titles in what remained of his own lands, after surrendering liberally to his chiefs, Konohikis and Government. No one would seriously contend that the King should have procured awards of his own lands from the Land Commission, or signed Royal Patents to himself for them.

I think that erroneous opinions have sometimes prevailed as to what are "Ahupuaas" and "Ilis."

An Ahupuaa has been called the "unit" of land in this country; but it is by no means a measure of area, for Ahupuaas vary exceedingly as to size. Many Ahupuaas are divided into Ilis; other Ahupuaas have no Ilis in them, as for instance, Kualoa and Waimanalo on this island.

There are two kinds of Ilis. One, the Ili of the Ahupuaa, a mere subdivision of the Ahupuaa for the convenience of the chief holding the Ahupuaa, as for instance, the Ilis of Lihue and Waimanalo, in the Ahupuaa of Honouliuli. The Konohikis of such Iliainas as these brought their revenues to the chief holding the Ahupuaa.

The other class were the "Ili Kupono" (shortened into "Ili Ku.") These were independent of the Ahupuaa, nor did they pay general tribute to it.

In some cases these Iliainas are very numerous, absorbing the

larger part of the Ahupuaas. A well-known case is the Ahupuaa of "Waimea," Hawaii, of which the Ilis of "Waikoloa" and "Puukapu" form about nine-tenths.

There are some Ilis that do not seem to be in any Ahupuaa—as for instance, the Ilis mentioned in pages 400 and 401 of the Civil Code, and set apart as "Fort Lands" for the support of the soldiers. They are mentioned as "Ilis of Honolulu," and yet there is no Ahupuaa of "Honolulu," which is but a name for the locality; and I believe there are no lands known as the Ahupuaas of Manoa, Makiki, Kapalama, or Waikiki, though there are numerous Ilis and Kuleanas awarded under these names, which I understand to be names of localities. It may be, however, that as all the territory of these lands was absorbed by the Ilis and the Kuleanas, there was nothing left to be applied for or granted.

The Ilis in question in this suit are not distinctly named "Ili Kuponos," this name not being preserved in the mahele; but all the Ilis that were recognized and treated in the mahele and awarded by the Commission were undoubtedly "Ili Kuponos." This name was dropped, for, when separated from the Ahupuaa by mahele and subsequent award, its necessity was gone. All other Ilis went with the Ahupuaa in which they were situated, and were not further distinguished.

The inquiry just gone into is pertinent to the case before us, as showing that the "Iliaina" was a well-known division of land with its own identity, and I cannot see how the mahele or the award of the Ahupuaa of Kailua carried with it an Ili having its own distinct identity—unless clearly expressed or manifestly intended, and it is not so expressed, for the mahele calls for the "Ahupuaa" only.

All the Acts of the King repel the idea that he so intended it. He preserved the separate identity of these Ilis by receiving specific re-leases for them in the mahele, naming them in his deed of reservation which was confirmed by Act of the Legislature.

Having satisfied myself that the title of the "Iliainas" in

question remained in the King, notwithstanding the mahele and award of the "Ahupuaa" to Queen Kalama, the question remains: Did the devise under the Will of Kamehameha III. to the Queen carry these Ilis to her?

Article fourth of the will is as follows: I hereby give and devise to my Queen Hazaleleponi Kapakuhaili, the lands mentioned below, in fee, in lieu of her dower, if she accepts it.

These are the lands:—

Kula.....	Ahupuaa.....	Puna.....	Hawaii
Kapalaalaea.....	".....	Kona.....	"
Kalahuipuaa.....	Ili no Waimea.....	Kohala.....	"
Anaehoomalu.....	".....	".....	"
Waipio.....	Ahupuaa.....	Hamakua.....	"
Kaohe, etc.....	Ili no Wailuku.....		Mau
Waikahalulu.....	".....	Honolulu.....	Oahu
Kailua.....	Ahupuaa.....	Koolaupoko.....	"
Kaneohe.....	".....	".....	"
Hakipuu.....	".....	".....	"

Article five constituted his adopted son, Alexander Liholiho (Kamehameha IV.) his residuary devisee. I cannot see that this devise conveyed anything to the Queen. She already had these lands by the mahele, and her awards had been adjudicated by the Land Commission. The King's devise, however, confirmed her title and removed all question as to the validity of the mahele or award to his Queen.

But the King devises the "Ahupuaa" of "Kailua" and "Kaneohe," and there are no words from which it can be deduced that anything more than those "Ahupuaas" was intended by the King. These "lands" were devised by him—and the list contains Ilis as well as Ahupuaas—and the Ilis in question in this suit are not mentioned in this list.

As to possession as the basis for a title by prescription, the title to these Ilis having been found to be in the King Kamehameha III. at the time of his death, it passed by force of his will to Kamehameha IV., and it has been settled by the decision often referred to in this opinion, in the estate of Kamehameha IV., that the title in that King's lands passed to Kamehameha

V., his successor, and is now in the Commissioners of Crown Lands, the defendants at bar.

Adverse possession of these Ilis could have been commenced by Kalama from the death of her husband the King, December 15, 1854, or as soon as his coverture ceased.

I understand that there is no prescription against the State, (see *Kahoomana vs. Minister of Interior*, 3 Hawn., 635) but the King as an individual cannot claim this immunity. *Nullum tempus occurrit regi* means the King as representing the Government and as guardian of the lands of the State.

The evidence as to actual possession or occupancy of these Ilis was not laid fully before me, except in the case of the Ili of "Keaahala," for which a lease of Kamehameha IV. is shown, dating in 1856, which would rebut the claim of plaintiff's title by adverse possession of this Ili.

If plaintiff can show that Queen Kalama or her heirs or assigns have had, during twenty years last past, adverse, uninterrupted and undisputed possession of any or all of the Ilis in question, this would be a complete bar to an action by the defendants to recover them.

Having arrived at the above conclusions of law and fact on the points submitted to me, either party is now at liberty to move the Court further as to them may seem best.

Plaintiff, in person.

A. S. Hartwell, for the defendants.

Honolulu, March 21st, 1877.

W. S. PAHUKULA *vs.* W. C. PARKE, Administrator.

ASSUMPSIT. BEFORE McCULLY, J.

JULY TERM, 1877.

Whether an alteration in a promissory note is material is a question of law for the Court: but whether there is an alteration is a question of fact for the jury.

Under §49, Chap. 32, Laws of 1876, the maker of a note may deny that he has signed it: and evidence that he has been heard to deny it is admissible.

DECISION OF McCULLY, J., ON MOTION FOR NEW TRIAL.

The points referred to in the argument were the following:—

I. The note on which the action was brought being offered for proof, defendant's counsel ask the Court on mere inspection to find that there has been an alteration and to exclude it from the jury.

In fact, the written words "five hundred" being somewhat more compressed does not show to my mind an alteration. It is frequently the case that the latter part of a phrase written within a fixed space is compressed, from want of prevision in writing the first part.

As to the figure 5 in the sum of "2,500," there is an appearance of its being a 5 written over an 0. Now, if on that blemish the note had been withdrawn by the Court, there must have been no further proceedings, and if that ruling shall be made, the defendants will have not a new trial, but that there shall never be a trial, for at the beginning of every trial the subject matter will be ruled out by the Court, on mere inspection, as before.

Whether an alteration is material or immaterial is a question of law for the Court and it is error to leave that question to the jury. *Burnham vs. Ayer*, 35 N. H., is one authority out of many. The Court in this case did not leave it to the jury whether an alteration from \$2,000 to \$2,500 was material or not,

but instructed that it was material and would vitiate the note if made after delivery and without the consent of the maker.

But the Court left it for the jury to determine upon *their own inspection* coupled with the evidence offered, 1st, whether there had ever been an alteration; 2d, if alteration, when it was made, saying that it was for the party presenting the note to support it throughout, and if there were any suspicious circumstances to explain them.

II. As to the refusal of the Court to permit Keawe to be asked on cross-examination if he had ever heard Kanaina deny he had signed the note.

This ruling was made without argument on the common-law principle that while a declaration against interest may be proved, a declaration tending to invalidate a negotiable paper to which he had given credit by his signature, as claimed, could not be admitted.

Upon examination of Sec. 49 of our Statute of Evidence, Chap. 32 of Laws of 1876, I am satisfied that the alleged maker, Kanaina, could have been admitted to say that he had not signed the note, especially it not being in the hands of third parties, and it would appear that the witness Keawe ought to have been allowed to say whether he had heard him deny this signature. The defendants had made the issue of *non fecit*. The testimony was pertinent to that, and was relevant to his examination in chief, which had been to the effect that Kanaina had signed the note.

III. In respect to the question proposed to be asked of Mr. Bishop, I am of the opinion that where the genuineness of the signature and the question of fraud is raised, defendant ought to have been permitted to ask it.

The rulings on the second and third points being thus in my judgment erroneous, the *motion for a new trial is granted*.

J. M. Davidson for plaintiff.

E. Preston & A. S. Hartwell for defendant.

Honolulu, July 27th, 1877.

KUPELE vs. B. H. KAHANANUI.

ASSUMPSIT. BEFORE JUDD, J.

OCTOBER TERM, 1877.

If credit for necessities is given solely to the wife, the husband is not responsible.

DECISION OF JUDD, J., ON MOTION FOR NEW TRIAL.

The Court in this case charged the jury that if they found that the plaintiff gave credit solely to the wife, they could not hold the defendant liable. This charge was not excepted to.

Schouler, on Domestic Relations, page 83, states the law to be that "In all cases the husband will be discharged from liability where it appears that the goods were not supplied in his credit, but that the party furnishing them trusted the wife individually." The cases cited are: *Metcalfe vs. Shaw*, 3 Camp., 22; *Bentley vs. Sniffen*, 5 Taunton, 356; Addison on Contracts, 617; 2 Kent's Commentaries, 123, in which it is held that "If credit is given to the wife, the husband is not liable, though the wife lives with him; and the plaintiff having once given credit to the wife, could not shift his claim so as to charge the defendant." 1 Carr. & Payne, 116.

In *Shelton vs. Pendleton*, 18 Conn. 422, the Court say: "It is well-settled and for good reasons, that if credit be, in fact, given to the wife alone, the presumption of a contract obligatory upon the husband, expressed or implied, is repelled. In such case, the plaintiffs must be considered as relying upon the honor of the wife, or as having acted gratuitously."

In the case before the Court, the wife was living apart from her husband, and this had been the case for many years, and this was known to the plaintiff; and he admits he gave credit to the wife when he supplied her with the goods in question. He says in his testimony that in 1873 he delivered to defend-

ant's wife 128 bundles of pai ai at \$1 a bundle; that she paid him \$40 on account; that he thought she would pay him, and he trusted her. Did not think of the husband for payment, and it appeared in evidence further that the claim in question was never presented to the defendant until May of this year. His evidence as to the plaintiff trusting the wife solely was not contradicted or rebutted; nor could it well be, coming as it did from the plaintiff himself.

Now, if the tradesman cannot recover of the husband if, as a matter-of-fact, he trust the wife and not the husband, even if they be living together, when the presumption of the wife's agency exists, much less can he recover when they are living apart, when the presumption of agency ceases and the burden of proving authority is upon the tradesman.

It seems to me that this view is not opposed to the Code, Sec. 1286, which is but the common law on this subject. The husband cannot be made liable unless in fact he is trusted and his credit relied upon, and the tradesman may act in a way that will absolve a husband from his statute liability.

As the verdict of the jury is contrary to the law as charged by the Court, and directly contrary to the uncontradicted evidence in this case, it must be set aside and a new trial granted, which is ordered accordingly.

R. F. Bickerton, for plaintiff.

C. Brown, for defendant.

Honolulu, October 23d, 1877.

BERNARD & RAIMON *vs.* LOO NGAWK *et al.*

TORT. BEFORE JUDD, J.

OCTOBER TERM, 1877.

In actions for injuries to persons, the jury may give vindictive damages; but in trespasses to property, unless special misconduct and aggravation appear, the measure of damages is actual compensation to the injured party.

A verdict for \$1500, for damage caused by overflow from a dam, held to be excessive, and reduced to \$1000.

DECISION OF JUDD, J.

This is an action of Tort, in which damages are claimed of defendants for their causing plaintiffs' garden to be overflowed with water backed up by defendants' dam. The jury returned a verdict of \$1500, the full amount claimed, which the Court is asked to set aside as being excessive.

I recognize a distinction between actions for injuries to persons and those for injuries to property. In the former class of cases, if circumstances of aggravation exist, there is no fixed rule of compensation, and the jury are authorized to give vindictive damages. Courts are loth to disturb such verdicts.

In trespasses to property, however, unless special misconduct or aggravation appear, there is a fixed standard by which the damages can be computed, which is actual compensation to the party injured.

The Court in this case charged the jury that this was the principle on which their verdict should be based, and this was not excepted to by the defendants' counsel. They cannot, therefore, now claim, in order to justify this verdict, that this case came in a class between those in which vindictive damages can be claimed, and those where no evil motive is complained of. Exemplary or vindictive damages were not claimed by the plaintiffs.

Actual compensation for the loss and injury sustained was all they asked for, and this alone could they recover.

The jury had very little exact testimony before them; but the evidence of Mr. Peirce was, that in his opinion the value of the place was diminished one-half by reason of this injury. Colonel Jones testifies that he thought it would cost \$2000 to bring such a garden into existence in the condition that it was before the flooding took place.

To apply the rule of compensation to this, the portion of the testimony most favorable to the plaintiffs, the jury would not be authorized to find a verdict for more than \$1000.

The area submerged bore a small proportion to the rest of the garden, much less than one half. The plaintiff Raimon says that it cost him \$1000, spent in driblets, to prepare, plant and cultivate the whole garden.

I am aware that the jury were allowed to consider what the injury, in addition to the value of trees, etc., destroyed, was to the residence of the plaintiffs by reason of the swampy and miasmatic condition of the garden induced by the overflow, but it seems to me that this was all considered and summed up by Mr. Peirce when he testified that "the value of the place was diminished one-half."

A verdict for \$1000 could have been sustained on the evidence, though in my opinion a lesser sum than this would have compensated the plaintiffs fully; any sum over this is clearly excessive.

If the plaintiffs elect to reduce the verdict to \$1000, they may have judgment for that amount—they to make their election not later than twenty days before the next term and notify the clerk of the same. Otherwise a new trial will be ordered.

A. S. Hartwell, for the plaintiffs.

E. Preston & C. Brown, for defendants.

Honolulu, November 1, 1877.

In re IRA RICHARDSON.

MANDAMUS. BEFORE JUDD, J.

NOVEMBER, 1877.

A tax-payer neglected to furnish the assessor with a list of his property, and the assessor made an assessment *ex parte*: held, that this did not deprive the tax-payer of his right to appeal from the assessment, under the statutes.

Minister of Interior vs. Glover, 3 Hawn., 697; and *Widemann vs. Minister of Finance*, 3 Hawn., 791, distinguished.

Mandamus issued to compel the tax-collector to grant petitioner a certificate of appeal.

DECISION OF JUDD, J.

The Civil Code, which was enacted in 1859, contains a provision, in section 492, that when a tax-payer (who has been called upon or notified by the tax assessor) declines or refuses to give a list of his property subject to taxation, the said assessor "may make such list according to the best information within his reach, and the same shall be binding upon all persons interested." This section was amended in 1874, providing for one assessor in place of two, but making no other change.

In 1860, the Legislature provided for appeals from assessments. Section 9 of this act reads: "During the months of September, October and November, the tax-collector, upon receiving on deposit, costs or otherwise, as hereinafter provided, shall grant to any person disputing the amount of his or her assessment, a certificate of appeal of the annexed form, to be furnished him in blank, by the Minister of Finance, stating thereon the amount of taxes with which the appellant is assessed in the tax list."

Before this statute was enacted, there was no appeal from an assessment, whether taken from the voluntary return of the tax-

payer, or (in case of his neglect) when made up by the assessor, according to the best information within his reach. The question is whether the words of the Code, "the same shall be binding upon all persons interested," abridge the general right of appeal in such a case. I observe that the law of 1860 makes no exception, but allows "any person disputing his assessment to appeal." It seems to me that if the legislature had intended to limit the right of appeal to those who make a voluntary return, they would have expressed this particularly.

I have some difficulty in giving effect to the words, "and the same shall be binding upon all persons interested." The Legislature could not have meant that the assessment so made was binding, irrevocably, and subject to no appeal, because no appeal was then allowed in any case. I think that the Legislature meant that an assessment made up by the assessor, according to the best information within his reach, was as binding and valid as if it had been made up upon the information furnished by the party himself. Nothing should be taken by implication to abridge the right of the subject to resort to the appeal board—the tribunal created for the purpose of reviewing assessments.

The Legislatures of other countries have provided penalties for neglect of making returns, and generally the penalty is that of being doomed as it is called.

In the case quoted by the Attorney-General for the respondent *Minister of Interior vs. Glover*, 3 Hawn., 697, the Statute Bond contained sufficient words which the Court construed to deny the right of appeal.

The Act of 1874, p. 63, though enacted subsequently to the law allowing appeals, was merely for the purpose of providing for one assessor in place of two, and I place no significance upon the fact that the Legislature reiterated the rest of the section. The case of *Widemann vs. Minister of Finance*, 3 Hawn., 791, is also quoted by respondent's counsel. The only point in that case was whether the Minister of Finance was legally vested with the power to make an abatement of an assessment.

The expression used by the Court, "if he did not give in his own list, then he trusted himself to the discretion of the tax-assessor," was *obiter dictum*. The Court could not have intended to say that a party thus forfeited his right of appeal, for that question was not raised or discussed. I do not consider that it is necessary that the Minister of Finance should be made a party to this proceeding, for the reason alleged that the tax-collector refused to grant this appeal in obedience to the orders of his superior; for this order I do not consider to be a needful rule or regulation for the assessment of taxes, but the construction which the Minister has placed upon the statutes we are now considering. Though his subordinates were bound to accept this construction, it was always subject to challenge by the taxpayer.

The Act of 1860 allows an appeal to anyone "disputing the amount of his assessment," and the assessor must close his books by the 1st of September.

During September, October and November, the books are in the hands of the collector; the disputes then must arise with the tax-collector, or rather, the tax-payer learns the amount of taxes which have been assessed to him from the tax-collector, for it is during these months that the tax-collector must demand payment of the taxes assessed. There is nothing in the statutes to warrant the presumption that the tax-payer has any knowledge of the amount of his assessment until he ascertains it from the tax-collector during the months above mentioned, but the tax list placed in the collector's hands affords no evidence as to whether the assessment was made upon the return of the tax-payer or by the assessor upon the best information within his reach in default of such returns, that is to say, the law does not require the tax-assessor to note on his official book the sources of his information, and such a fact, if noted, is no part of the official record.

I think it highly proper that the Legislature should provide for some penalty for the tax-payer's not making due returns, but it is not in the power of the Court to say that the penalty of

such default shall be the forfeiting of his right of appeal, there being no words in the law plainly imposing this penalty.

The mandamus may issue as prayed for.

S. B. Dole, for petitioner.

The Attorney-General, for respondent.

November 30, 1877.

S. G. WILDER vs. BARK ESKBANK, Etc.

IN ADMIRALTY. BEFORE HARRIS, C.J.

DECEMBER, 1878.

Salvors allowed one-third of the amount saved: it not being a case of derelict or extra-perilous service.

DECISION OF HARRIS, C.J.

By the libel and answer it appears that the bark Eskbank went ashore on the reef near Diamond Head, four miles to the eastward of Honolulu Harbor, on Sunday morning, November 3d; that at the request of Messrs. G. W. Macfarlane & Co., the libellant dispatched two steamers belonging to him—the Like-like, of the burthen of 600 tons or thereabouts, and the Mokolii, of the burden of 100 tons—to the assistance of the bark. Messrs. Macfarlane & Co., in their note asking this assistance, promise to pay \$250 in case nothing should be saved, but in case the vessel and cargo, or any portion thereof, should be saved, then the libellant should have such salvage as should be allowed by this Court. It further appears by the libel and answer that the libellant proceeded to the wreck on the said 3d day of November (Sunday), and worked upon her with both the steamers, assisted by the Government tug-boat, to try and get the bark off, and finding it impossible, took off her crew and sent them ashore, and continued to work to save whatever could be saved until past midnight, and resumed work the next morn-

ing with the small steamer, the Mokolii, and continued to work until Friday, when the wind and sea very much increasing, he was unable to lie by the ship, and the bark broke up entirely the night between Saturday and Sunday, the 10th of November. On Sunday the 10th, he proceeded with both his steamers to pick up the cargo which was floating to seaward. The property thus saved being offered at public auction brought \$16,828.34, and on this amount the libellant claims salvage.

The Mokolii was valued at \$16,000, and had a crew of nine men all told; the Likelike is of large value, and had an insurance on her for \$75,000, which, the insurance agents thought proper to notify the owner, might be vitiated in case that accident should occur to them whilst performing this salvage duty. Her crew was forty-five people all told. In addition to the crews of these vessels, the libellant employed fifty or sixty men during the Sunday, 3d of November, and the night succeeding, and for the rest of the time employed thirty-five men at wages of \$3.00 per day and their food.

It is made to appear that the expenses of the libellant over and above the ordinary wages of the crews were \$2,623.25, which should be repaid to the libellant, together with a reasonable remuneration for the use of his vessels, labor of his crews, the risk he ran, and his own enterprise in the matter.

No vessel could have done much of the service except a steam vessel, and the expense of running steam vessels here is much greater than in the Atlantic on account of the higher rate of wages, the expense of repairing machinery, and the price of fuel.

This is not a case of derelict, in which it is usual, though by no means invariable, to decree one-half in the way of compensation, nor was it a case of great peril, either to the wrecked crew or the wreckers, no human life was saved, nor was human life put at hazard in the preservation of the property, nor was the property at the time of the undertaking of the enterprise in an apparently hopeless condition, but for the interposition of the salvors; on the contrary, the weather was fine, the wreck was

on the leeseide of the island, and was very near the port. In fact, there was nothing in it to make the work extra-perilous.

Under all the circumstances of the case, I think that a fair and proper remuneration would be one-third of the amount saved, and so decree.

Let judgment therefore be entered for the libellant in the sum of \$5,609.44. Costs to be proportionately divided between both parties.

E. Preston, for libellant.

J. M. Davidson, for claimants.

Honolulu, 18th December, 1878.

R. B. CHAVE *vs.* J. I. DOWSETT.

IN EQUITY. BEFORE JUDD, J.

DECEMBER, 1878.

Plaintiff claims rescission of a contract of sale of a vessel, on the ground of fraud, and seeks an accounting.

Held, on demurrer, that equity has jurisdiction, and that plaintiff has not an adequate remedy at law by suit for damages.

On the merits, the Court finds that plaintiff was not deceived as to defendant's title, and, if he was, has suffered no damage thereby; and orders an accounting.

The mortgagee of a vessel, in possession, is not vested with the legal title until foreclosure, although the mortgagor is unable and unlikely to redeem.

DECISION OF JUDD, J., ON DEMURRER.

I am of the opinion that this bill discloses equities.

Courts of Equity have jurisdiction in cases of fraud where the remedy at law would be inadequate.

The bill alleges the misrepresentation of a material fact for the purpose of inducing the complainant to enter into the purchase.

To be particular, the bill alleges that respondent, in order to induce complainant to exchange his half interest in the W. H. Allen for a half interest in the Pomare and \$500, represented that he was the owner of the Pomare, whereas he was not, and therefore asks to have the sale rescinded.

It is contended that as this is a matter of misrepresentation in regard to personal property, the law gives ample relief by an action for damages, and questions of ascertainment of damages are properly for a jury.

This bill, however, does not claim damages for non-fulfilment of the agreement to transfer one-half of the Pomare, but claims a rescission of the whole contract itself on the ground of fraud.

The bill further shews that in pursuance of this joint ownership of the Pomare, a contract was entered into for the sailing of the vessel on joint account, and that there are mutual accounts arising from these transactions which require adjustment even independently of the question whether the sale can be rescinded.

In mutual accounts growing out of privity of contracts, equity has general jurisdiction. 1 Story, Eq. Jur., §459.

Every original bill in equity may be deemed a bill of discovery, for it seeks a disclosure by the answer of circumstances relative to the complainant's case.

But this is not what is technically known as a bill for discovery, where merely a discovery of facts resting in the peculiar knowledge of the respondent, or of deeds, writings or other things is asked, but seeking no relief in consequence. Such bills are usually in aid of a proceeding at law.

In this case, however, relief from the contract for the purchase of the Pomare is asked for, and also, that an account of the joint transactions of the parties may be taken.

I do not see how it would be possible for the complainant on such a statement of facts to obtain redress at law. For if he should sue for the purchase-money paid for the interest in the vessel and his wages in running her, which are ascertained amounts, he would still be entitled to his share of the profits if

any were made, which cannot be ascertained until respondent has accounted. I therefore overrule the demurrer.

E. Preston, for complainants.

J. M. Davidson, for respondent.

Honolulu, December 7th, 1878.

DECISION OF JUDD, J., ON THE MERITS.

This is a bill in equity alleging that the complainant was induced to exchange his one-half interest in the W. H. Allen for a one-half interest in the Pomare, by the respondent's false representation that he was the owner of the Pomare, whereas he was not the owner, etc.; the bill prays relief from this sale and an account of the dealings between the parties.

From the correspondence submitted and the evidence taken, which are voluminous and lengthy, I find the following important facts: That in September, 1876, both the W. H. Allen and Pomare were in the Port of Honolulu, the former being owned jointly by complainant and respondent, and being then re-coppered and repaired. The Pomare was a better vessel for the cattle trade to Tahiti, with which trade complainant was familiar and had been engaged in while sailing the W. H. Allen. The parties had had some conversation in reference to a purchase by complainant of a half interest in the Pomare. Her situation was as follows: Her owners—Messrs. George W. Macfarlane & Godfrey Brown—had turned her over to the agency of the respondent, who assumed a mortgage of \$7000 on her; Messrs. Macfarlane & Brown had given to the respondent a bill of sale of her on the 7th September, 1875, the consideration named being \$7000, the amount of the mortgage which respondent assumed to pay, and these parties executed on the 11th September an agreement which, after reciting this bill of sale, declared that the transfer was intended as security by way of mortgage; and that while any money remained due on this security, Macfarlane & Brown would keep the vessel in good repair and condition, keep her insured, and on the 7th September, 1876, would repay the \$7000, with interest, and

would indemnify respondent against loss by collision, negligence of captain, officers or crew, or "otherwise however," in relation to the said vessel; and the respondent declared that he held the vessel as mortgagee, and covenanted to retransfer her to Macfarlane & Brown on the repayment to him of the moneys advanced at the time stated. At the expiration of a year's running the vessel proved to be not successful, and was owing respondent somewhat over \$5000 for advances, in addition to the \$7000 for which the security was given.

I do not understand that the failure of Macfarlane & Brown to pay these amounts on the 7th September, 1876, operated to make the bill of sale absolute, for Courts of Equity hold that where a deed absolute is coupled with a defeasance, it becomes a mortgage, and at the expiration of the time agreed for the repayment the title does not vest in the grantee, but "once a mortgage always a mortgage," and the right to redeem is still open to the grantors. 2 Hilliard on Mortgages, Chap. 4. The legal situation, then, of the Pomare in October, 1876, when the complainant and respondent had their negotiation, was that she was the property of Macfarlane & Brown, and was mortgaged beyond her value to respondent.

I do not place much importance upon the question which is disputed, as to whether respondent or Macfarlane actually negotiated the sale to complainant. The solution of this question cannot alter the legal status of the parties.

The questions of importance in this case are whether Chave was deceived, and if so, has he suffered damage thereby. From all the evidence adduced, that of both complainant and respondent, as well as of Macfarlane, Brown and Buchanan, I am led to the conviction that complainant knew at the time the real situation, *i.e.*, that Macfarlane & Brown were really unable to redeem the vessel, and there was no likelihood that they would be able to do so; and that he (complainant) had enough on which to hold respondent in case they did redeem the vessel and thus put it beyond the power of respondent to make him a title, for the complainant took an agreement from respondent in which their respective interests in the Pomare were declared

and this agreement would estop respondent from ever denying to complainant that he (complainant) was the owner of one-half interest in the Pomare. But if complainant was actually deceived into parting with his share of the W. H. Allen, how is he damaged thereby?

The various losses which the vessel sustained on her long cruise of twenty-three months were owing, some of them, to stress of weather; and the other losses are attributable to unforeseen changes in the market at the various ports visited, for none of which can the respondent be held liable. Nor can the detention at Melbourne after the verdict in favor of the Pomare for the collision, in order to hear the application to the Court on the *rule nisi*, be laid to respondent, for the grounds for the rule were the alleged excessive damages as well as the question as to proof of title of the vessel, and we cannot say which was mainly relied upon.

I am of the opinion that complainant has shown no instance in which the pecuniary losses sustained can be attributed to respondent's defect of title, for complainant, as master and half-owner, planned and executed all her various ventures and voyages without reference to respondent. Some of these, as for instance the taking of a charter for a load of lumber from Burrard's Inlet to Sydney, would seem to be ill-advised for so small a vessel as the Pomare; but, as the complainant acted in good faith in this matter, I cannot hold him responsible for more than his share of the loss.

On the 10th August, 1878, the deed of defeasance between Macfarlane & Brown and respondent was cancelled and surrendered. This vested the title of the Pomare completely in respondent, and he must now make title to complainant; and I refer the accounts to John E. Barnard, Esquire, Master of this Court, and decree that, on their coming in, the brigantine Pomare be sold, and the proceeds be held for the payment of the amount found due against either party.

E. Preston, for complainant.

J. M. Davidson, for respondent.

Honolulu, January 15, 1879.

KAHULA *vs.* KUAMU *et al.*

EJECTMENT. BEFORE JUDD, J.

FEBRUARY, 1879.

Motion for new trial may be made after expiration of ten days from verdict, or after the close of the term, on the ground of new evidence discovered too late to bring the motion within the time allowed by statute: it would be reasonable to entertain such motion at the next term, provided the judgment had not been executed or the status of parties changed.

In this case, the defendant having surrendered possession to plaintiff after judgment, the motion is denied.

DECISION OF JUDD, J.

This is an action of ejectment tried at the last October Term of this Court, in which a verdict was obtained by the plaintiff.

After the term closed, but before the January term opened, the defendants, by new counsel, filed a motion for a new trial on the ground of newly-discovered evidence.

Objection was made to this motion being entertained as being too late, and because no bond for costs, etc., as required by Section 1156 of the Civil Code, was filed.

This section allows motions for new trials to be made at any time within ten days after verdict, and Rule VIII. allows bills of exceptions to be tendered to the Court at any time before the adjournment of the Court for the term.

In this case the ten days after the verdict had expired, and the Court had adjourned for the term. The counsel for the motion contends that the provisions of Section 1156 apply to causes for new trials which have been developed during the trial of the case itself, and not to the present motion, on the ground of *after* discovered evidence.

It would seem to be reasonable and just not to apply the provisions of this section to a party who had discovered facts which it is supposed would reverse the judgment, when the discovery

is made after the term had adjourned, and after the ten days from the verdict had expired, provided that due diligence had been used to procure the testimony, but without success—but to allow him a new trial.

This was allowed in the case of *Lipoa vs. Dowsett*, 3 Haw., 623, where the verdict was rendered October 13, 1874, and the motion filed in the opening days of the January term following. In that case the defendants discovered, between the terms, an unrecorded deed necessary to his case, among the grantor's archives, and a new trial was allowed. But the point now made was not taken in that case.

I am unable to find authorities upon the question as to the limit of time within which such motions may be made, as it is a matter of statutory regulation in most countries. In the old Digests I find it said that it is never too late to move for a new trial, on a discovery of new facts, if it be done in a reasonable time.

See Harrison's Digest, p. 3962.

In the absence of any statutory provision in this Kingdom limiting the time, I think it would be reasonable to entertain such a motion at the next term after the judgment, provided that the judgment had not been executed, or the status of the party (in whose favor the judgment was given) with reference to the land, remained unaltered. In this case, as I am informed that the defendant had surrendered possession to the grantee of plaintiff before the motion was filed, it is too late and I must deny it.

Preston & Brown, for plaintiff.

A. S. Hartwell, for defendants.

Honolulu, February 18th, 1879.

J. MOTT SMITH *et al.*, Trustees of Lunalilo Estate *vs.*
S. G. WILDER, Minister of Interior.

IN EQUITY. BEFORE JUDD, J.

FEBRUARY, 1879.

The dedication by a church of a portion of its land, for a Royal Mausoleum, held to be of such a character that it ought not to be revoked or interfered with.

The mausoleum held to be property of the trustees under the will authorizing its erection: and the Minister of Interior has no right to its possession, notwithstanding the Legislature have made an appropriation for pay of a keeper of the mausoleum: the Government is under no obligation to care for the property, as it does not belong to the state.

DECISION OF JUDD, J.

This is a bill in equity to determine the right of possession, care and control of the mausoleum which was erected in 1875, the Stone Church standing in Kawaiahao, in Honolulu," and which now contains the remains of His late Majesty Lunalilo.

The churchyard in question was conveyed by deed of King Kamehameha III. and his Kuhina Nui, Kekauluohi, dated the 21st day of July, A.D., 1842. It is entitled "The conveyance of the Stone Church standing in Kawaiahao, in Honolulu," and grants the building and premises to the members of that church so long as they adhere to the religious creed which is given in full in the deed. This deed was confirmed by the "Board of Commissioners to Quiet Land Titles" on the 22d January, A.D., 1849, by Award on Claim No. 635, which awards "the premises to the members of the first church of Honolulu, to have and to hold the same to them and their successors upon the terms and conditions set forth in the before-mentioned deed, or in other words, so long as they shall continue to exist as a church and sustain their present faith."

On the 19th September, 1874, on the request of the executor of the will of His late Majesty, the executive committee of the

Kawaiahao Church dedicated and set apart a site for the erection of this mausoleum, on the western side of the churchyard, which action was, on the 26th September, ratified and adopted by the Board of Lunas, or church officers, and the report of the executive committee ordered engrossed on the church records. The dedication thus formally made would estop the Kawaiahao Church from revoking the dedication and from making any other disposition of this ground, so long as it continued to be used as the site for the Lunalilo Mausoleum.

I quote from *Hunter vs. Trustees of Sandy Hill*, 6 Hill, 411: "Land may be dedicated to pious and charitable purposes, as well as for public ways, commons and other easements in the nature of ways, so as to conclude the owner who makes the dedication. Dedication, as the term is used in reference to this subject, is the act of devoting or giving property for some proper object, and in such a manner as to conclude the owner.

"The law which governs such cases is anomalous. Ordinarily, some conveyance or written instrument is required to transmit a right to real property; but the law applicable to dedications is different. A dedication may be made without writing; by act *in pais*, as well as by deed.

"It is not at all necessary that the owner should part with the title which he has, for dedication has respect to the possession, and not the permanent estate. Its effect is not to deprive a party of title to his land, but to estop him while the dedication continues in force from asserting that right of exclusive possession and enjoyment which the owner of property ordinarily has."

See also *Cincinnati vs. Lessees of White*, 6 Peters, 431; *Commonwealth vs. Viall*, 2 Allen, 514.

The dedication of this land for the erection of a Royal Mausoleum may be considered as a dedication if not to a *quasi* public use, certainly to a purpose, the character of which, as a resting place for the dead, entitles that it should be sacredly preserved and hallowed.

According to common law in cases of ordinary interments in

the ground, the heir has no property in the bodies or ashes of his ancestors, and he cannot sustain an action against such as disturb the remains, but as the body after burial becomes a part of the ground where it was committed, "earth to earth, ashes to ashes, dust to dust," the person who has the freehold of the soil can bring an action of trespass *quare clausum fregit*, against those who disturb or disinter it; and any person who has the actual possession of the land may sustain this action against a wrong doer. 2 Blackstone's Com., 429; *Meagher vs. Driscoll*, 99 Mass., 281; *Barnstable vs. Thatcher*, 3 Met., 243.

But where the owner of the freehold of the cemetery has, by a deed, conferred a right to the exclusive occupation of a particular lot in a cemetery, such grantee may maintain an action for trespass on the particular lot. See 99 Mass., 284.

Blackstone says further, that "other personal chattels there are, which also descend to the heir in the nature of heirlooms, as a monument or tombstone in a church, or the coat-armor of his ancestor there hung up, with the pennons and other ensigns of honor suited to his degree. In this case, albeit the freehold of the church is in the parson, and these are annexed to that freehold, yet cannot the parson or any other take them away or deface them, but is liable to an action from the heir." 2 Bl. Com., 429.

The facts of the case before us are quite different, and therefore the above principles of law are inapplicable.

The body of His late Majesty was not interred in the ground, nor was it placed in a church with a monument or tomb erected over it, or affixed to the walls or floor of the church, but it was placed in a separate mausoleum erected by the executor of the will, in accordance with his plain directions, in the Kawaiahao churchyard in Honolulu.

By directing the "suitable tomb" to be erected for the reception of his own and his father's remains, the royal testator contemplated the expenditure of a considerable sum of money from his estate; for a "suitable tomb" must mean a tomb suitable for the interment of one of Hawaii's kings in the condition of

this one as to lands and fortune, and that it would be, when built, a permanent structure affixed to the soil.

I think also that the testator must have contemplated that his tomb would, according to the custom of this Kingdom, need a custodian as well as repairs in course of time. Now, when he made the disposition of all his real estate to trustees for a charitable purpose, he had a right to assume that when the time came (on the death of his father) for the appointment of the trustees, this tomb would be built and that it would form part of his estate. That the tomb itself, on land dedicated upon a formal record by the holders of the freehold to this purpose, is a part of the estate of His late Majesty, I have no doubt. And though there are no specific words in the will, vesting it in the trustees or authorizing them to expend money in keeping it in repair, I am of the opinion that it was the intention of the testator that his trustees should have that authority.

In 2 Perry on Trusts, §477, a citation is made from 2 Hare, 145, in which it was held, "where a fund was directed to be laid out in land, and there was already a settled estate to the same uses, it might be more beneficial to apply part of the fund to prevent buildings on the settled estate from going to destruction than to apply the whole fund to the purchase of new lands, but it would be an extraordinary case which would move the Court to create an exception."

And *ibid* Sec. 478, "Superintendents of public works and similar *quasi* trustees may apply the funds under their control in opposing legislation which would operate injuriously to the interests confided in them. Lord Cottenham said that 'every trustee is to be allowed the reasonable and proper expenses incurred in protecting the property committed to his care.'"

His Majesty Lunalilo having disposed of all his property, real and personal, by will, his heirs at law have no interest in this matter. The Kawaiahao Church have, by dedication, consented to the use of a portion of their freehold for this mausoleum; it has no funds which can be used for its care and maintenance; it is under no legal or moral obligations to sustain this mauso-

leum; it has therefore no further interest in it so long as the site is kept for the purposes for which it was dedicated.

The claim of the Minister of the Interior now remains to be considered. It is quite plain from the will that the testator wished his remains to be kept free from state control. If he wished otherwise, he would not have provided a special tomb for himself, and his remains then would have reposed in the state mausoleum. But it is said that the grant of the Legislature of \$400 "for pay of keeper of Lunalilo's tomb" for two years, implies the right of the Minister of the Interior, who is the dispenser of this fund, to the possession of the tomb. But this grant was purely a voluntary one on the part of the Legislature for services to be rendered, and the Government is not bound to draw and expend it, as it would be if this sum was voted in fulfilment of some prior obligation or contract on the part of the Government. If the Government should ascertain that the services of a keeper were not needed, or that his pay was otherwise provided for, it would be under no obligation to draw or expend the money.

This mausoleum not being state property, the Government is under no obligation to care for it, and the Government's act in taking possession of it cannot be justified. As, in my opinion, the intention of the testator will be better carried out by the possession of this tomb remaining in the trustees of his real estate, I therefore grant the prayer of the bill, and decree accordingly.

Messrs. Dole & Hartwell, for complainants.

Attorney-General Preston, for respondent.

Honolulu, February 21, 1879.

M. GREEN, *et al*, Assignees of C. Ai, Bankrupt, vs. ASIONA,
et al, Minor sons of said Bankrupt.

IN EQUITY. BEFORE JUDD, J.

MARCH, 1879.

Assignees in bankruptcy, suing to set aside a conveyance as in fraud of creditors, held not to have a plain and adequate remedy at law.

Equity can decree conveyance of a minor's interest in land, where the conveyance to the minor was fraudulent.

The assignees need not aver that the minor's lands are needed to satisfy debts of the estate: but the Court orders the bill held till the assignees file a report showing condition of the estate.

DECISION OF JUDD, J.

The bill is demurred to on the grounds:

1. That the Court cannot decree the conveyance of an infant's land:

2. That there is no averment in the bill that the assignees in bankruptcy are unable to obtain full satisfaction of the debts owing by the bankrupt without resort to the lands or the minor's title therein:

3. That the complainants have a plain, adequate and complete remedy at law.

I will consider the third ground of demurrer first. The remedy at law by a suit in ejectment is not "plain," for the bill alleges that the bankrupt procured the conveyance from the grantor to his minor sons, he paying the purchase money in fraud of the rights of existing creditors, and therefore he never had the title to this land.

The remedy at law is not "adequate and complete," for the complainants would not be entitled at law to have the conveyance treated as a nullity because made in fraud of the rights of existing creditors, for the creditors are interested only so far as they can show that the bankrupt invested money in the purchase of this land and improvements thereon which he ought to

have paid over to them. The value of the land over these must enure to the benefit of the minors as a voluntary settlement in their favor.

As to the first ground of demurrer. The respondent relies upon certain Massachusetts decisions where it has been held that the Court cannot make decree against infants for the conveyance of their real estate so long as they are minors. I find that in the case of *Whitney vs. Stearns*, 11 Met., 321, the Court declined jurisdiction on the ground that the statute did not confer general jurisdiction in equity in matters of fraud. A later statute in Massachusetts (1855) confers that jurisdiction, however, and our statute of 1878 is similar. This would be an additional reason for overruling the third ground of demurrer, for our statute confers jurisdiction on Courts of Equity in matters of fraud.

The case of *Coffin vs. Heath*, 6 Met., 77, asserts the proposition broadly that the Court could not enforce a claim for contribution against the estate of a minor during his minority, on the principle that the infant is entitled to a day in court after attaining his majority to show cause, and the statute gave no authority to the guardian to sell the estate for such a purpose or to mortgage it, as security for the lien sought to be enforced.

In this last case there was no element of fraud. Story lays down the doctrine plainly that it is "inconsistent with the good faith which a debtor owes his creditors to withdraw his property voluntarily from the satisfaction of their claims, and no man has the right to prefer the claims of affection to those of justice." 2 Story Eq., §355.

"If a man indebted was allowed to divest himself of his property in favor of his wife or his children, his creditors would be defrauded." *Ib.* §357.

I know of no cases where a Court of Equity has declined to decree a conveyance of a minor's interest where the conveyance was fraudulent. Such a ruling would enable a debtor to put his land beyond the reach of his creditors, a proceeding which it would be extremely unjust to protect.

As to the second ground of demurrer. I do not think such an averment necessary in the bill, for the presumption would be that a bankrupt's estate is insufficient to meet his obligations, and his assignees have a right to proceed as they did.

But that there may be no question on this point I think it better to hold the bill until the Report of the Assignees shall have come in, when it will appear whether they need the property in controversy with which to discharge the debts of their bankrupt.

Demurrer overruled and the bill held for further proceedings after the Assignees' Report is in.

Preston & Brown, for complainants.

A. S. Hartwell, for respondent.

Honolulu, March 14th, 1879.

W. L. GREEN vs. GEORGE POPE *et al.*

IN EQUITY. BEFORE HARRIS, C.J.

APRIL, 1879.

Specific performance decreed, of a contract for sale of land, in favor of the vendee, as against the vendor and a purchaser from him: it appearing that the contract of sale was absolute and not conditional: that the vendor, by his actions, waived any tender by the vendee of a deed or the purchase price: and that the subsequent purchaser from the vendor was put upon enquiry and had sufficient notice of the first sale.

DECISION OF HARRIS, C.J.

It is alleged by this bill that the defendant Pope executed an instrument on the 8th of February last, which is called, throughout these proceedings, an agreement to sell the property in question, and which partly reads as follows: "For the consideration hereafter mentioned and one dollar, George Pope

hereby sells to W. L. Green, all the property of his plantation at Waipunalei, District of Hilo, Hawaii, consisting of, etc."

The defendant Pope in his answer admits that he signed the instrument, but says that he did so under the belief that it was a mere basis for the negotiation of the sale of the property, and was not to be binding if he (Pope) could get better terms from other parties.

It is alleged in the bill that the defendant Pope gave up the property to plaintiff's agent, and the defendant Pope replies that he did not do so, but that some person in the employ of the plaintiff did take forcible possession without his authority; and he likewise denies that he gave up the books of account in the bill of complaint mentioned.

A great deal of testimony was taken upon this point, and great stress seems to be laid upon it by the defendant Pope. But the whole thing is immaterial, since the question now is, not whether the defendant Pope did give the property up, but whether he ought to have given it up, and whether the defendant ought now to be compelled to give it up. The testimony is, probably, introduced by the plaintiff, for the purpose of showing that the action of Pope was not that of one who thought he had a reserved right to find another purchaser for a better price; and certainly it is clearly proved, by Mr. Pope's testimony itself, as well as that of others, that he did deliver up the books to Mr. Green.

The agreement of the 8th February contains no clause indicative of any reservation of a right to re-sell the place; and Mr. Green admits that before the signing of the agreement, he advised Mr. Pope to try and get better terms, but says that Pope replied to him that he had been to everyone and could do nothing, and avers that neither at the time of making the agreement, nor subsequently, did he make any condition of the kind; and Mr. Pope, who was examined on the stand, does not show, at any time, any conversation with Mr. Green which indicated a permission on Mr. Green's part for him to re-sell the land. It is clearly established, and Mr. Green testifies to the same effect,

that if defendant Pope desired to take \$5000 worth of shares in the Ookala Sugar Company instead of the \$4500, he might do so, but this is very far from an agreement or understanding that he might re-sell the land to others; it is merely a proposition on the part of the plaintiff to substitute one mode of payment for another, if the defendant should so desire, and the defendant said he would take the matter into consideration. Then there is no evidence whatsoever of any proposition or assent on the part of Mr. Green, either at the time of writing the agreement, or signing, or at any time subsequent, to the effect that Pope might re-sell the property. The sale was unreserved and complete, and one that, if its conditions are kept on the part of the plaintiff, ought to be enforced; but the defendant says that no deed of transfer of said property to the plaintiff has ever been tendered him for execution, nor has he ever been offered or tendered the sum of \$4500 or promissory notes with a satisfactory endorsement as provided for by the agreement. At the hearing, promissory notes of the plaintiff with an endorser were offered, and a constant offer was made during the argument to pay cash. This, however, is immaterial, as will be seen hereafter; but still I allude to it to say that no man can avoid his contract when made for notes by simply saying that the name of the endorser is not agreeable to him; the farthest that could be ruled would be that the money could be obtained on notes, if the payee should endorse them without recourse to himself; but plaintiff was not obliged to tender any conveyance or notes at all under the circumstances; for as regards a conveyance, Pope discharged Green from the necessity of preparing one "by signifying that he never would execute it." Chitty on Contracts, 11th Ed., Vol. I., p. 425. "When one party demands of the other the performance of a mutual agreement by which concurrent acts are to be performed by each party, the offer on the part of the party making the demand to perform his part of the agreement is implied or understood; and when the other refuses to comply he thereby dispenses with any other offer." *Tinney vs. Ashley*, 15 Pick., 546. "The failure to deduce a title

or a wrongful re-sale by the vendor renders the preparation and tender of a conveyance by the purchaser unnecessary. Chitty on Contracts, *supra* p. 428. So likewise it was unnecessary to tender the notes so long as they aver in their bill a willingness and readiness to comply with their part of the contract under the circumstances; for where the declaration shows that the defendant had conveyed to a stranger the land which he promised to convey to the plaintiff, this excuses the plaintiff from tendering the money and would entitle him to damages for the breach of the contract." 16 Mass., 166. So that it is clear, that so far as the defendant Pope is concerned, there is no reason why he should not be decreed to a specific performance of his contract if the lands were still in his hands, and thus the question arises as regards the defendant Lidgate.

"If a man acquiring property has, at the time of the acquisition, notice of an equity binding the person from whom he takes in respect of the property, he is bound to the same extent and in the same manner by the same equity. The purchaser of property if the vendor has contracted to sell, is, if he has notice of the contract, bound by the same equity by which the vendor whom he represents was bound." Kerr on Fraud and Mistake, p. 234, and the cases therein quoted.

Now, it appears by Lidgate's testimony that when he came to Honolulu, he referred to the records of the office of the Registrar of Conveyances, and finding no deed registered there, deemed himself free to purchase this land. But, says Judge Story, Equity Jurisprudence, Vol. I., §397: "The object of all acts of registration is to secure subsequent purchasers and mortgagees against prior secret conveyances and encumbrances. But where such purchasers and mortgagees have notice of any prior conveyance, it is impossible to hold that it is a secret conveyance, by which they are prejudiced. On the other hand, the neglect to register a prior conveyance is often a matter of mistake or of overweening confidence in the grantor, and it would be a manifest fraud to allow him to avail himself of the power, by any connivance with others, to defeat such prior conveyance."

And Lord Hardwicke remarks that "the taking of a legal estate after notice of a prior right, makes a person a *mala fide* purchaser." If a person does not stop his hand, but gets the legal estate, when he knows the equity was in another, *machinatur ad circumveniendum*. (He makes schemes for the purpose of circumventing.)

Now let us apply these principles of law to Lidgate's position and see how he stands. He says he saw the *Gazette*, in which there was a notice that the sale to Green had been made. Now this, of course, would not be proof that the man sold his place, but was sufficient to put Lidgate on his guard. He says that he asked Pope whether he was going to take him down to Honolulu on a fool's errand. He says, farther, that he had the conversation with Mr. Arnold, which Mr. Arnold details, and Mr. Arnold says he had the copy of the agreement which he had sent for. He further says that he asked Pope whether he had sold the place, and that Pope told him he had not; that he heard various statements about it, so he went to headquarters (Mr. Pope), and adds, "I didn't want to know whether he (Pope) had sold the place or not, because he (Pope) told me he had not." Now the difficulty in that respect was that it appears that he was notified that there was an agreement, a copy of which was directly accessible to him, but it appears that he didn't desire to read it; and Pope therefore was not the headquarters, but Green was; Pope was the last man from whom he could seek information on the subject, for the very allegation which Arnold was making in behalf of his employers was that he had this agreement or a copy of it; that he would send for it. Now it was Mr. Lidgate's duty to look at that agreement. One cannot shut their eyes and ears and then say the facts do not exist. Beside all this, Mr. Lidgate admits the conversation with Mr. Green before he gave the notes for the land as by his agreement, in which conversation Mr. Green set forth his agreement and offered to show it. Lidgate admits that he knew thoroughly that Pope was not acting in good conscience, but says that he didn't think that Mr. Pope's good or bad conscience had anything to do with him;

neither had it, but Mr. Lidgate's knowledge of Mr. Pope's not acting in good conscience had a good deal to do with him. All this conversation with Mr. Green occurred before Mr. Lidgate had given his notes, therefore, by every rule of equity and justice Mr. Lidgate is bound by the acts of Mr. Pope, nor will he suffer any inconvenience other than that which he has brought upon himself, namely, the inconvenience of defending this action; for the notes which he had given to Mr. Pope will be of no value against Lidgate, unless they may be in the hands of third parties for value, which it appears they are not; so that when Mr. Lidgate shall have made a quit claim deed of the property and surrendered it, he will be exactly in the same position which he would have been if he had never interfered with the purchase. Therefore, it follows that Lidgate likewise must be ordered to convey the property, and to give up the possession of it, in accordance with the prayer of the petition; and when counsel shall have prepared a form of decree and order in accordance with the foregoing I will sign it, but before signing it, the plaintiff must pay into Court, for the use of Mr. Pope, the sum of \$4500, less the amount of note signed by Mr. Pope and endorsed by the plaintiff in favor of Mr. Lenehan; and must likewise pay into Court the aforesaid note duly cancelled, since I cannot undertake to adjudicate on the subject of good or bad endorsement on the notes.

Messrs. Davidson & Bickerton, for complainant.

Mr. Preston, for respondents.

Honolulu, April 24, 1879.

PUHALAHUA *vs.* M. PEDEROZA.

CASE. BEFORE McCULLY, J.

APRIL TERM, 1879.

Plaintiff hired of Defendant a horse to use in an express wagon: Defendant warranted the horse as fit to drive in a milk-wagon: the first time Plaintiff harnessed and drove the horse, it kicked and broke the wagon and harness.

Held, from the evidence, that the horse was of previous good character and the trouble must have been due to Plaintiff's unskillfulness in harnessing or driving: and that the warranty, if any, was only that he was a good horse for a milk-wagon, not for an express wagon.

It appearing that Plaintiff had the horse on trial, Defendant is not liable for direct or consequential damage.

DECISION OF McCULLY, J.

This action came before the Court by appeal from the acting Police Judge of Honolulu.

The declaration was as follows: "That the defendant was possessed of a horse which to his knowledge was a kicking and vicious horse unfit to be used or driven in a city express wagon, yet the defendant by falsely and fraudulently representing to the plaintiff that said horse was well broken, gentle and used and fit to be driven in a city express wagon and not a kicking or vicious horse, induced the plaintiff to take said horse on hire to use and drive in the plaintiff's express wagon in said Honolulu, and the plaintiff believing said representation to be true was thereby induced to take said horse of the defendant for hire to use and drive in the plaintiff's express wagon in said Honolulu, yet (as the defendant well knew) the said horse was not gentle, well broken or used to be driven in a city wagon or fit for use in the plaintiff's express wagon but was a kicking and vicious horse, and on the first day's use by the plaintiff in his said wagon, the said horse refused to go and kicked, jumped and

behaved in a vicious manner, and broke and seriously damaged the plaintiff's said express wagon and harness and thereby interrupted the plaintiff's said business to the plaintiff's damage \$150. Wherefore the plaintiff asks judgment against the defendant for one hundred and fifty dollars and costs of Court."

In this Court both parties waived trial by jury and requested the justice holding the term to hear and determine the matter on testimony heard by said justice.

In respect to the transaction between the parties we have only their own testimony. The plaintiff says that he asked the defendant for a horse, that defendant told him he had a good horse to hire, a horse "maa i ke kaa waiu" *i.e.* accustomed to be driven in a milk wagon. The defendant says that the plaintiff solicited him very urgently for this horse, and that he at first refused saying that he wanted the horse for his own business, that of milkman. The plaintiff intended to use the horse in his hack wagon, as the defendant knew. The defendant harnessed or assisted to harness him in plaintiff's harness and attached him to plaintiff's hack and drove him a turn in view of plaintiff to show that he was a good and safe horse. On plaintiff's asking what would be the terms of the hiring, the defendant answered that he would not then set them, but that plaintiff should have the horse for two days on trial to see if he would like him. The plaintiff testifies that he then drove the horse home at Niupaipai, and after dinner harnessed him to come down town, that on starting from his premises the horse "oala"d, that is, kicked or made a demonstration of kicking, though not to do any damage, and he proceeded with him; that after taking in some passengers, and while going on a level piece of road, without any known occasion for it the horse commenced to kick, breaking the carriage to the extent of \$10 for repairs and the harness to the extent of \$5: Koa witnessed the "oala" at starting.

There was testimony that the plaintiff was a skillful and careful driver.

The defendant testified strongly that he had driven the horse

for a year, or at times during a year in his milk wagon and that he had always found him free from vice and safe in every respect, both up and down hill. Three other witnesses who had known or driven the horse gave the like testimony. One of the plaintiff's witnesses testified that he had once seen the horse when on the milk round, and his driver was off the wagon, start off at a common trot, the defendant easily overtaking it. The defendant denies this, but such a start cannot be considered a vice, neither is it the fault through which the plaintiff suffered.

The plaintiff and Koa testified that the harness was sound and not tied up with string. The defendant to the contrary, and that he warned the plaintiff that his harness was not safe. Likewise Kikao, of whom plaintiff purchased the harness, testifies, that he bought it of one Hookano, and that it was old, broken and mended a year ago.

It is not clear to me that the condition of the harness affects the case in its origin, for there is no testimony that the harness broke, from which the horse fell to kicking, or that a stronger harness would have held him from breaking the carriage and harness. It can only be relevant in view of the greater breakage suffered and repairs needed in a weak or rotten harness if damages should be awarded.

The counsel for the plaintiff urges that in view of the skill and carefulness of the plaintiff as a driver it must be inferred that the accident arose from vice in the horse, against which the defendant had given an express warranty in terms, and an implied warranty from furnishing it as a horse suitable for the use which he knew the plaintiff intended him for, and that whether he gave such warranty or warranties, knowing that the horse was not fit for such use, or recklessly, without knowing what was the disposition and training of the horse, he was equally responsible to plaintiff for damages suffered in consequence of the horse proving vicious.

The defendant's counsel argues that many witnesses establish that the horse was a safe one, and that having been shown to have been used a long time without exhibiting vice, and this

accident occurring as soon as the plaintiff had harnessed and driven him, it must be inferred that it resulted from something for which the plaintiff is responsible.

On this point I cannot find a preponderance of evidence for the plaintiff. If a good previous character could be established by testimony it was established in this case and not contradicted. It seems that the horse as defendant had harnessed him drove quietly from the defendant's place down town, to the plaintiff's in the valley, but that when the plaintiff harnessed him again he immediately showed by a demonstration of kicking that something was wrong with him. If he had never before kicked in harness, as the proof positively is, I must infer that some fault in the plaintiff's handling occasioned it, at least I cannot find testimony to charge the defendant.

As to warranty, I incline to find as between the partly opposing statements of the parties, that the plaintiff solicited this horse from his knowledge of him in defendant's employment. The defendant said that he had always found him safe in his line of business, and he appears to have limited his recommendation to that, for the plaintiff quotes him as saying "maa i ke kaa waiu," and does not say that he gave any other recommendation than the vague one that he was "lio maikai," a good horse; does not say that he told him he was a good horse for the plaintiff's business. The defendant would seem to have specially avoided giving any warranty beyond his own experience of him, for although the transaction proposed was not a sale but a hiring which might be terminated at any time, he refused when asked to state terms until the plaintiff should have made trial for two days. He seems to have thrown it upon the plaintiff to judge for himself of the fitness of the horse for his purpose. Upon such a transaction it would be a hard rule to hold the defendant liable as upon a warranty for the direct and for the consequential damages which accrued to the plaintiff. The plaintiff's counsel cites 2 Allen, 347; Addison on Torts, p. 404; 117 Mass., 195; 103 Mass., 506; 18 Pick., 109; Bigelow's Leading Cases on Torts, p. 21, respecting

defendant's liability, and other authorities respecting the measure of damage.

It seems to me they do not apply in principle to this case, which in its essence may be stated thus: That the plaintiff wishing to hire the defendant's horse, had leave to take him on trial, the defendant only saying that as far as he had used him he was a good horse, and leaving the plaintiff to proceed on his own judgment.

I therefore find verdict for the defendant.

A. S. Hartwell, for plaintiff.

J. M. Davidson, for defendant.

April 24th, 1879.

J. KUPAU, Tax Collector, *vs.* H. P. RICHARDS.

ASSUMPSIT. BEFORE McCULLY, J.

APRIL TERM, 1879.

Under §513, Civil Code, exempting from personal taxes "all clergymen of any Christian denomination regularly engaged in their vocation:" held, that a Mormon Minister is entitled to the exemption.

DECISION OF McCULLY, J.

Assumpsit for \$5 for defendant's personal taxes, for 1878. By appeal from judgment of the District Court of Koolauloa, and tried by the Court without a jury. The only matter in controversy was if the defendant be exempt under this provision found in Section 513 of the Civil Code, viz.: "The following persons shall be exempt from personal taxes: All clergymen of any Christian denomination regularly engaged in their vocation."

The defendant gave the following testimony: "I am a minister or clergyman of the Church of Jesus Christ of Latter Day Saints, and was in the exercise of that vocation in July last (date of assessment) in Koolauloa, Island of Oahu; I profess

the doctrines of the Christian religion; I do not know of any tax being assessed on our church sites; the Church at Waikiki and that of Honolulu have not been taxed, nor that of Laie; I never heard of a church site of our denomination being taxed; our creed is shown in this pamphlet (quoted below); we are not authorized to practice polygamy in the Hawaiian Islands; I am in all respects ordained and licensed regularly as a clergyman of the church to which I belong."

The witness exhibits a license from the Minister of the Interior to solemnize marriage in which he is entitled "Elder," the witness saying that the Minister of the Interior asking him if he would be styled "Reverend," the witness had replied that he would be styled "Elder."

Also exhibited a certificate that "Elder Henry P. Richards has been duly appointed to a mission to the Sandwich Islands, to preach the Gospel and administer all the ordinances thereof pertaining to his office, etc." Dated Salt Lake City, Territory of Utah, November 29, 1876, signed by Brigham Young and two others, as the "First Presidency."

On cross-examination the witness said: "I believe in the revelation contained in the New Testament; I believe in other revelations since then; I am not a Mohammedan; I don't accept the Koran; there are many revelations we believe that have been given through Joseph Smith, the founder of the church; there are no later revelations than those published in the pamphlet (above spoken of); we believe all that God has revealed, and that He will yet reveal more than He has revealed; we preach faith, repentance and baptism by immersion, for the remission of sins and the laying on of hands for the reception of the Holy Ghost; those are what we term the first principles of the Gospel as taught by our Savior Jesus Christ; we claim there are Apostles now, succeeding the Apostles of Christ, naming twelve men; we believe the Book of Mormon to be a revelation written by the prophet; I am one of the travelling Elders of the church; polygamy is believed in by the church; I don't know of any of our church sites being taxed."

Direct examination resumed. "We are not authorized to practice polygamy, except at the head-quarters of the church; we believe if it was necessary for the Lord to speak, that He would communicate as He did of old; I have no other business here than this ministry of our church; I am supported by the members of our denomination resident here."

Hanai, a witness for defendant, testifies that he was in charge of the Mission Church site in Waikiki, and that to his knowledge it had not been assessed during his time, three years.

The following is the creed exhibited by the defendant: "We believe in God, the Eternal Father, and in His Son Jesus Christ, and in the Holy Ghost; we believe that men will be punished for their own sins, and not for Adam's transgression; we believe that through the atonement of Christ all mankind may be saved by obedience to the laws and ordinances of the Gospel; we believe that these ordinances are, first, faith in the Lord Jesus Christ; second, repentance; third, baptism by immersion for the remission of sins; fourth, laying on of hands for the Gift of the Holy Ghost; we believe that a man must be called of God, by prophecy, and by laying of hands by those who are in authority to preach the Gospel and administer in the ordinances thereof; we believe in the same organization that existed in the Primitive Church, viz., Apostles, prophets, pastors, teachers, evangelists, etc.; we believe in the gift of tongues, prophesy, revelation, visions, healing, interpretation of tongues, etc.; we believe the Bible to be the word of God, as far as it is translated correctly; we also believe the Book of Mormon to be the word of God; we believe all that God has revealed, all that He does now reveal, and we believe that He will reveal many great and important things pertaining to the Kingdom of God; we believe in the literal gathering of Israel, and in the restoration of the Ten Tribes; that Zion will be built upon this continent; that Christ will reign personally upon the earth, and that the earth will be renewed and receive its paradisaic glory; we claim the privilege of worshipping Almighty God according to the dictates of our conscience, and allow all men the same

privilege, let them worship how, what or where they may; we believe in being subject to kings, presidents, rulers and magistrates, in obeying, honoring and sustaining the law; we believe in being honest, true, chaste, benevolent, virtuous, and in doing good to all men; indeed, we may say, that we follow the admonition of Paul, we believe all things, we hope all things, if there is anything virtuous, lovely or of good report, or praise-worthy, we seek after these things."

Taking the testimony to be true, and there is nothing offered to contradict it, why should not a Mormon Minister be held for the purposes of this statute to be a Christian Minister? I find no difficulty in holding that the defendant is a minister. The counsel for the Crown argued from his taking the title of "Elder," and not "Rev.," that he had disclaimed holding ministerial office. But he testifies that such is the designation of a minister or clergyman in his denomination, and that he is a clergyman or minister. It does not appear why the use of the term "Rev." should be the test of the class of persons intended by the statute. It is the custom of some other denominations to style their ministers "Elder." The Baptists and Methodists do this to a considerable extent. The ministers of the Roman Church are usually styled "Father."

It is equally clear from defendant's testimony, that he is in the exercise of his calling. He has come to this Kingdom for that purpose. He exercises no other employment, and he is supported by the people of his denomination for the reason that he gives them his time and labor in exercising the ministerial office for them. The evident intention of the law is to exempt Christian ministers from the burden of taxes, on the ground that they must be supported by portions of the community, and to tax them is to impose an additional tax on the public in the support of religion and morals. For the same reason church sites are exempt. The question remains, is the defendant, being a Mormon Minister, a Christian Minister? Upon the proofs offered and the creed presented, he must *prima facie* be considered such. He believes in Christ and preaches Him.

The church is styled the Church of the Lord Jesus Christ. They accept the Old and New Testament.

It was urged, *per contra*, why this is not a denomination of Christians:

First, Because they accept other revelations than those contained in the Holy Scriptures.

The Roman Catholics must be considered a Christian denomination, yet they receive largely authorities and revelations outside the canon of the Scriptures, the authority of the Fathers and of councils. The dogma of the infallibility of the Pope may be considered as implying a power of revelation existing in the priest, who may have been elected to the head of their church, for his infallible utterances are not supposed to be a repetition of texts of the Holy Scriptures, to which, in Christian belief, he can add no sanction, but of something else not contained therein—a revelation. The same church accepts many revelations, from time to time—for a modern instance, the revelations to a nun at Lourdes, in France. On credence and sanction of this church, a shrine was established and a costly church built to our Lady of Lourdes, to which thousands of pilgrims resort. Every miracle believed to have been wrought by bones and relics of saints is a belief in something beyond the canon of the Scriptures. If the Mormons accept the Bible and believe in Christ, and believe also in the revelations of Joseph Smith, they must equally as Roman Catholics be considered a Christian denomination.

In Robbins' Religion of all Nations, page 6, it is said: "The religious world is divided into four grand systems, viz.: Christianity, Judaism, Mohammedanism and Paganism. Christianity is the religion of those who believe that Jesus Christ is the true Messiah and the Savior of men, and who receive the Holy Scriptures of the Old and New Testaments as the word of God. Judaism, of all those who still look for a promised Messiah. Mohammedanism, of all those who acknowledge Mohammed for a true prophet. Paganism, of all

those who have not the knowledge of the true God, but worship idols.

The only people who may not be classed under one or the other of these four divisions are the Deists and the Atheists, the latter differing from them all in owning no religion, and the former in owning no Divine revelation as the foundation of their religion." Cited in *Hale vs. Everett*, 53 N. H., 9.

The second reason why the Mormon Minister should not be included, was the tenet of polygamy.

We must proceed upon the proofs. The testimony is that the Mormons do not preach it here nor practice it here; and it does not appear that the subjects of this Kingdom are led to go abroad to practice it. It is not proved or shown inferentially that the Mormon doctrines in regard to marriage here tend to immorality. It is well known to us all, that the Mormon system leads in Utah to a practice of plural marriages which would not be tolerated here. Let that be so, still until it is shown by proof that the Mormons of this Kingdom are affected in their conduct by this doctrine, it will not be a ground for excluding them from the privilege accorded to other denominations professing Christianity. This may be illustrated by a reference again to the Roman Catholic denomination. The doctrine of their church supports an inquisition which shall force men by unspeakable tortures and death to profess an accord with their faith. The civil power of this Kingdom does not permit the exercise of this coercion here. It has been suppressed for the most part in all countries, yet this church, which professes immutability and infallibility, must be considered to hold to the theory. In Spain and in Austria, under the operation of Roman Catholic doctrine, the preaching of the Gospel as known to the Christian world, other than the Catholics, is either greatly hampered or totally suppressed. In the countries under Catholic rule, an *Index Expurgatorius* suppresses some of the best and truest literature of the time. These things which are subversive of freedom and liberty of conscience are not practiced here, and we do not therefore exclude the church which

supports, teaches and practices them elsewhere from the definition of a Christian denomination, and the Mormon must stand on the same ground. Judgment for the defendant.

E. Preston (Attorney-General), for plaintiff.

A. S. Hartwell, for the defendant.

C. BREWER & CO. *vs.* THE BARK ALSTER.

IN ADMIRALTY. BEFORE HARRIS C.J.

MAY, 1879.

Damage to cargo, by rust, held to be a peril of the sea, and not due to bad stowage.

DECISION OF HARRIS, J.

The libel in this cause sets forth that certain railroad iron was taken on board of bark *Alster* at Liverpool, and by reason of the bad stowage was so damaged on the voyage hither as to cause a loss to the shippers by reducing its value (say) \$5,000; and the libel expressly avers that such loss was not caused by dangers of the sea.

The answer is a simple one, setting up no new matter, but denying any liability, and directing attention to the clause in the Bill of Lading that the shipper is not liable for leakage, breakage, loss or damage by heat, sweat, rust or decay, unless occasioned by improper stowage.

The damage complained of is a very great rusting of the iron, by which, it is testified, that the value of the iron is depreciated 25 per cent. on the original value; and an attempt is made to show, by testimony, that this depreciation or rusting is occasioned by improper stowage of the ship. The iron is of the T pattern, and was stowed in such a manner as to dove-tail the iron together, boards being put as dunnage between every alternate layer; the effect of which was, as it is said, to make the iron present a solid face on each one of the tiers; whereas, it is said

that the proper way of stowing railroad iron is to place it diagonally so as to make diamond shape intervals, or, as the witnesses say, "to diamond it," the effect of which would be, as it is testified, to let the water through more freely, if there should be leakage from above; and to bring the weight higher up in the ship, so that, as it is contended, the ship would labor less in a sea way.

The whole testimony goes to show that the bark in question was loaded with very heavy material (dead weight) iron, bricks, coal, cement, machinery, etc.; that she leaked on the voyage out, from her deck and from her sides. The testimony is strong to the effect that she was staunch and well found when she put to sea and the leakage was caused by the laboring of the ship; and indeed, this is the theory of the libellants themselves, since their whole effort is directed to proving that if the iron had been differently stowed in the ship, she would not have labored so much, and consequently would not have leaked so much. Some testify that the iron should have been more distributed about the ship; and others, that it should have been piled in the diamond shape; and they say, that by these means, there would not have been so much danger of the ship leaking, since the dead weight by the first mode would be more distributed.

I have examined the whole matter carefully, and it is not apparent to me that such would have been the case, since bricks are as much dead weight as iron, and iron machinery is equally dead weight as railroad iron; and indeed, the entire cargo of the ship was made up of weighty articles of this description, so that, it does not seem to me that any change in the distribution of the cargo would have had any effect whatsoever in the leaking of the ship.

Again, regarding its being stowed in diamond shape, it is in testimony here, that the ship was a very crank one, and the general testimony is that in loading a ship reference must be had to her qualities, and this ship being a crank ship, the weight of her loading must be brought down as low as possible. The testimony of Captains Pierce and Smith, who went aboard to sur-

vey the vessel and the cargo, is to the effect that but a very small quantity of water came in from the decks, but a more considerable quantity from the sides; and it therefore appears, that the straining of the ship caused the leakage, which caused the damage. The mate of the ship says, that three or four days out from the Mersey they found themselves on a lee shore at Small's Rock; and that they were obliged to carry all the sail that they could pack on the ship to avoid imminent disaster; and that he found soon, that the ship was making more water than she ought to make, but still not enough to be at all alarming, or make it very difficult to keep the ship free; he farther testifies, that the leakage was mainly between the main and mizzen masts, and in tracing the whole matter back, to the best of his judgment, the leaks occurred from the press of sail they were compelled to carry in weathering Small's Rock and from the laboring of the ship some days afterward. The leaks as they are described, not only by the mate himself, but by Captains Pierce and Smith, indicate most clearly that the leakage was caused in the way which the mate indicates.

Now to say that this action of the ship was caused by bad stowage, or that any other mode of stowage would have prevented it, is to say more than is possible within human knowledge.

The allegation is that it was bad stowage that caused this damage; now the proof should be, not that it caused it in a secondary remote and speculative way, but in a direct mode, for it would be impossible to stow a ship in such a way as to prevent one from supposing, and saying in case of accident, that if she had been stowed in some other way, the same result might not have occurred; perhaps if the bricks had been in that part of the ship where the iron was, and the iron where the bricks were, nothing would have been damaged; but that does not show that it was injudicious or unskillful work to stow the bricks as they were and the iron as it was. This ship was stowed in a port whence they are accustomed to carry railroad iron as cargo, by stevedores skillful in the work. The iron

was stowed in the way it was, for the purpose of availing themselves more thoroughly of the carrying capacity of the ship, and I cannot see that a want of judgment in the mode of stowage led, directly or even indirectly, to the damage alleged; but on the contrary, it seems to me to be clearly proved that the ship was staunch and well found at the commencement of her voyage; and that the damage done is the result of the dangers of the sea.

The libel is therefore dismissed, each party paying their own costs.

A. S. Hartwell, for libellants.

Castle & Hatch, for respondents.

Honolulu, May 13th, 1879.

In Re C. AKANA.

MANDAMUS. BEFORE McCULLY, J.

SEPTEMBER, 1879. .

Chapter 33, Laws of 1876, relating to Interpleader, does not apply to District and Police Magistrates.

The words "Court" and "Judge" import a Court of record or a Judge thereof.

Such power as is conferred by this statute is never given to Courts of inferior jurisdiction.

A Police Justice having no jurisdiction to proceed under this statute, Mandamus does not lie to compel him to certify up an appeal from his decision.

DECISION OF McCULLY, J.

It appears that the petitioner, having a judgment in the Police Court of Honolulu against one Aloka, levied on certain personal property, but that before the sale one Ah Chuck came before the Police Justice, on the 12th of September instant, and claimed to be entitled to the goods and chattels in execution in his own right; that the Police Justice, after notifying the petitioner,

heard evidence on the claim in pursuance of the provisions of Chapter 33 of the Acts of 1876, being an Act to amend the law of interpleader, and afterwards pronounced judgment in favor of the claimant and ordered the Marshal to deliver him the goods and chattels seized. From this judgment the petitioner asked for a certificate of appeal to the Intermediary Court, tendering the costs. The Police Justice refused to grant an appeal, basing his refusal on the 10th section of the Act. The petitioner now prays that he may be ordered to grant appeal.

A. S. Hartwell, for petitioner, urges:

The denial of the appeal is based on the provision in section 10, that the judgment and decision of the Court in a summary manner shall be final and conclusive against the parties and all persons claiming by, from or under them.

But this cannot intend to bar the general right of appeal provided against all decisions of a Police Justice.

1. Article 7 of the Constitution secures a jury trial in all cases heretofore used, and this statute only provides another method for the adjudication of a question which might be brought in trover or replevin, and a claimant cannot bar a party of his right to go to a jury on appeal by selecting this method of proceeding.

There may be an appeal from "summary" proceedings—e. g., under the Landlord and Tenants Act.

This Act of 1876 does not expressly repeal the general statutes respecting appeals. It only repeals the provision by which a sheriff might summon a jury to try a claim for property seized, and he could disregard the verdict and sell if properly indemnified. Now, if the present statute is substituted and all appeal is barred, it would take away the right to a jury trial where it has heretofore been used.

A right of appeal is always implied in cases heard by a Justice of the Peace. *Jones vs. Robbins*, 8 Gray 341; *Sullivan vs. Adams*, 3 Gray 476; *Kenny's Case*, 108 Mass. 496, and *Beers vs. Beers*, 4 Ct. 538, to the effect that a statute not allowing appeals from a magistrate would be clearly unconstitutional.

2. This statute need not be held unconstitutional by interpreting it that such judgments are final and conclusive, unless appealed from under the general provision for appeal. In *Glover's Case*, 3d Hawn. Reports 701, it was held that no appeal lay on the facts, because such had been the statute from a time prior to the Constitution, and because the licensee expressly waived such appeal by the terms of his license.

3. "Final judgments of State Courts are the only cases appealable to the Supreme Court of the United States." *United States vs. Bailey*, 9 Pet. 272.

W. C. Jones, the Police Justice, respondent, relied on the terms of section 10 and the authority of *Glover's case*, and made no argument.

PER CURIAM: In order to obtain a solution of the question, whether the judgment of a Police Justice upon the right of property seized by the Marshal in execution is subject to appeal to a higher Court or to a jury, I examine the entire Act of Interpleader and make the following observations:

Section 1st provides a procedure for a defendant in a personal action in a Court of Record, whereby he may bring to the knowledge of the Court or any Judge thereof the interest of any third party, who may then be required to become a party to proceedings in such action or on a feigned issue,—that is to say, this statute provides for what might be done by a bill of interpleader in equity.

Section 2 is, with an unimportant variation in phraseology, identical with Section 10, on which the Police Justice has declined to grant appeal. There is no doubt that Section 2 applies only to the proceeding of a Court of Record, as directed in Section 1.

The 3d and 4th sections apply likewise. The 5th section, premising that the Marshal and his officers are exposed to the hazard and expense of actions on claims made to goods and chattels in execution and otherwise, further enacts, relative to such claims against the Marshal or officers, what is found in sections 5, 6, 7, 8, 9 and 10. Section 5 speaks of executions

issued by the Courts of the Kingdom, says the Court or any Judge thereof may on application of such officer cite parties by rule, order or summons, and exercise for his protection and relief all or any of the powers and authorities before given—that is, compel a party to be plaintiff or defendant, proceed to trial on one or more feigned issues, or direct such issues to be tried, determine the merits of claims in a summary manner, and make such rules and orders as to costs and all other matters as may appear to be just and reasonable.

Section 6th provides that the Court or Judge may exercise these powers though the titles of the claimants have not a common origin but are adverse to or independent of one another.

Section 7 gives the Court or a Judge, when the claim is under a bill of sale, chattel mortgage or otherwise, power to order the sale of the whole or part on such terms as he may think fit as to the payment of the whole or part of the secured debt.

Section 8 refers to the rule or order “from a Court of Record” as the order previously spoken of, and empowers the Court or Judge, when the amount involved is small, at the request of either party to determine the same in a summary manner, with full authority as to terms, costs and other rules.

The 9th section provides that when it is a question of law only, the Judge may order a special case to be stated for the opinion of the Supreme Court, which shall proceed thereon as upon a submission.

Section 10 provides for the two courses before given, viz., first the trial on an action or issue ordered by the Court or Judge, and secondly the summary decision of the Court or Judge without such trial, that both shall be final. And section 11, referring to both the proceedings under the first four sections of the Act and those under sections 5 to 10, provides that all rules, orders, matters and decisions to be made in interpleader proceedings under this Act shall be entered of record in the Supreme Court.

Now the words “Court or Judge” of themselves import a Court of Record or a Judge thereof, but, when taken in connec-

tion with the express mention of a "Court of Record" in the 1st and 8th sections, the close inter-connection of all parts of the Act, and the absence of any expression to show that the jurisdiction is intended to be conferred on police or district magistrates, my inference is that this Act does not apply to those officers. It could only be supposed to do so, as being "Courts," but the word Court is used in this statute in a connection which is inconsistent with the Court of a District or Police Justice; for instance, in the 4th section when it is provided that if upon application to a judge in the first instance, or in any later stage, he shall think it more fit for the decision of the Court, it shall be lawful for him to refer the matter to the Court, and the Court shall then proceed as if the matter had originally commenced by a rule of Court instead of the order of a Judge. One may ask what meaning such a provision could have if "Judge" here meant a District or Police Justice, and what Court would be intended.

Chapter XV. of the Civil Code, "Of Island Courts not of Record," uniformly employs the term Police Justice or District Justice or the said Justice, and does not designate them, after the caption, as a Court or a Judge.

But besides the clear import of the terms, it is no less evident from the subject matter that this jurisdiction is not intended to be given to magistrates. The power to order in parties, to direct or to try feigned issues, to make such rules and orders and state special cases for the judgment of the Supreme Court, and generally to exercise the large discretionary, equitable and summary powers here conferred, is never given to Courts of inferior jurisdiction.

The language of sections 2 and 10 could not apply to District Justices without what might be termed an evasive construction, and the argument that there must be an appeal from a judgment which is enacted shall be summary, final and conclusive, or the statute be found unconstitutional, is an argument to show that the statute is not intended for such Justices.

Having found that the said Police Justice had no jurisdiction to proceed under the Statute of Interpleader, no mandamus will lie for an appeal.

A. S. Hartwell, for petitioner.

Respondent in person.

Honolulu, September 25th, 1879.

R. LISHMAN *vs.* H. GILES *et al.*

ASSUMPSIT. BEFORE HARRIS, C.J.

DECEMBER, 1879.

Service of garnishee process on the manager of a corporation, at the corporation's office, the president being out of the country, held to be service on the corporation.

DECISION OF HARRIS, C.J.

Robert Lishman obtained judgment against Henry Giles at the last July Term of this Court, and subsequently, on the 11th day of August, filed a petition for a garnishee process, setting forth that the Honolulu Iron Works, a corporation established by the laws of this Kingdom, and within the jurisdiction of this Court, is indebted to said Giles in a large amount; and also, that Alexander Young, as agent of said iron works, or individually, is indebted to said Giles, and praying that the property in the hands or possession of said iron works may be attached, and the said Young may be summoned; and the process was issued commanding the officer to serve the Honolulu Iron Works by Mr. Young, and the return is that it was so done. The amended return is in the following words:

"Served the foregoing petition and summons by delivering true and certified copies of the same to Henry Giles and Alexander Young, the managing agent for the Honolulu Iron Works, in charge of their business, at the office of said company

at their works in the city of Honolulu, by officer Bartholomew, this 11th day of August, 1879."

On the 12th day of August, Mr. Young appeared and filed the following answer:

"Alexander Young, for himself and the Honolulu Iron Works, answers that the said corporation is indebted to said defendant in the sum, as shown by the books of account, \$939.13, which sum is liable to correction for errors and for deficiencies, if any, in said defendant's accounts, and against which sum the said corporation has an offset for counsel fees incurred for said defendant at the request of said corporation acting for said defendant, the amount of which fees is not yet ascertained."

And upon that answer an order was made as follows:

"Alexander Young, for himself and said Honolulu Iron Works, answering that said corporation is indebted to said Giles in the sum of \$939.13, which sum is liable to correction for errors and for deficiencies, if any, in said Giles' accounts; now therefore, it is ordered and said corporation is strictly enjoined to retain in their hands, subject to the order of this Court, any and all sums of money due the said Giles at the time of serving the garnishee process in this case; and said corporation is farther strictly enjoined not to pay said money or any part thereof to said Giles, or to any other person whatsoever until farther order of this Court. And whereas by the return it appears that it is possible that there may be some offsets for errors or deficiencies in the account of said Giles, it is ordered that the said corporation have two weeks for the purpose of ascertaining said set off, if any there be, and of filing an amended return if they shall find it necessary."

It appears by the testimony of Mr. Hatch, that when he was on his way to the office of the corporation for the purpose of serving this order on the corporation, he met the gentleman who appeared as attorney for Mr. Young, on the return day of the writ, near the office of Mr. T. H. Davies, who is the president of the corporation. Mr. Hatch told Mr. Hartwell what his business was, and asked him if he should proceed with the restrain-

ing order to the office of the company, or if he would take it, and the attorney said he would take it. He farther testifies, and it is an undoubted fact, that Mr. Young is manager and in charge of the business of the corporation; that the corporation has an office at the iron works and not anywhere else; and that Mr. Davies, the president, was not in the country when the process was served.

On the 18th of August, Mr. Young filed an additional answer as follows:—

“And the said Alexander Young further answers that he is not the president of the said Honolulu Iron Works Corporation, on whom by the charter of said corporation legal service is required to be made, and that he is not authorized to accept or waive service of legal process for said corporation or to bind the said corporation by any agreement to pay over moneys. That he is informed by the president of said corporation that on Monday, the 11th day of August, instant, on an order made by said Giles in writing on the same day, to pay over to A. S. Hartwell for legal services \$250, and to pay to C. Afong the balance due him, said sums have since been paid in accordance with said order; and that he, the said Alexander Young, has, and since the service upon him of said garnishee process has had, no funds or other property of said defendant in his hands or possession.”

It will be observed that this answer is somewhat evasive, for although it states that Mr. Young is not the president of the corporation, yet it does not state that he is not the managing agent. He says that something occurred on “Monday the 11th of August, instant, on an order made by said Giles,” but does not say what occurred; and farther says that the president paid the balance due Mr. Giles in accordance with the said order since that time, but does not say when he paid it, nor does he state why the unusual course was pursued of the president paying an employee instead of the managing agent, and he farther says that “since the service upon him of said garnishee process he has had no funds or other property of said defendant

in his hands or possession," which looks like a contradiction of the statement in his first answer that he as agent of the company had funds of the defendant.

By Section 1102 of Civil Code, it is sufficient service in this country, in case any defendant cannot be found, that a certified copy of a summons shall be left with some agent or person transacting the business of the defendant, or at the defendant's last place of residence. Certainly the residence of a corporation is the place where it does its business, and certainly Mr. Young is an agent or person transacting the business of that corporation; and further, even if it were necessary to find the president at all, which is, to say the least, very doubtful considering the manner in which this company is shown to transact their business, he could not be found, being out of the country, so that under any circumstances the service made on the defendant corporation is good; and if the defendant corporation by any of its officers has since the service of the original process paid any sum for account of the defendant Giles, without the order of this Court, they have done it in their own wrong.

Let judgment therefore be entered against the Honolulu Iron Works, garnishee, in favor of Robert Lishman for the sum of \$939.13, and let this judgment be entered as of the 27th day of August, 1879.

Castle & Hatch, for plaintiff.

J. M. Davidson, for defendant.

A. S. Hartwell, for garnishee.

Honolulu, December 20th, 1879.

KEONI KAPU *vs.* M. MCINERNY.

ASSUMPSIT. BEFORE HARRIS, C.J., IN INTERMEDIARY COURT.

JANUARY, 1880.

Delivery of bunches of bananas, on the steamer wharf, to a servant of the buyer, who counted, sorted and ticketed them with names of consignees, held to be a sale and delivery: and the claim of the buyer, that the contract called for a delivery on board the steamer, held not proven.

DECISION OF HARRIS, C.J., ON APPEAL FROM POLICE JUSTICE OF HONOLULU.

The question in this case is what constitutes the sale and delivery of the 155 bunches of bananas, the subject in question. It is admitted on all hands that the bananas were put upon the steamer wharf and left in charge of Antone Rosa, who objected to some of them as being smaller than the others, and separated 25 bunches of them and pronounced them to be worth 75 cents a bunch. In other words, he deducted 25 cents from agreed general price, which is a dollar and ten cents, the ten cents being in plaintiff's mind the payment for freight. The plaintiff consented to this deduction, saw the tags put on them, left them, and, as he says, considered his work with them done. The tags spoken of were the names of the consignees in San Francisco. Now if this constituted a delivery by the plaintiff and receipt by the defendant, there can be no question of the liability. The defendant alleges that Rosa was no agent of his, and did not take them for account of himself, but for account of the plaintiff; that the agreement with the plaintiff was that the bananas were not to be considered delivered and the sale complete until they were aboard the ship, and introduced several persons as witnesses to show that such was their understanding of their own agreement with the defendant.

Now it is obvious that if this kind of testimony was objected to, it could not be admitted, since these witnesses were not

present at the agreement with this plaintiff, and the agreement with one person is not evidence of an agreement with another.

Kapu, the plaintiff, testifying for himself, says that his bargain was "when the bananas were delivered at the wharf my connection ceased;" and again, "I asked defendant to pay for the bananas and he refused because they were not on board, but I had nothing to do with them because he had his labels on them."

Keoni Kukiiahu testified that he was present at the bargain, and defendant said, "When delivered at Honolulu at the wharf and my man counts them, they are mine;" and again, "Antone Rosa received the bananas from the schooner, and when they were all ashore he arranged them and put aside the small ones. He picked 130 bunches which, as he said, were worth \$1 each, and twenty-five bunches worth 75 cents each. I saw him put the tags or labels on the bananas. I didn't ask Antone Rosa to look after my bananas during the night. I understood that when I delivered the bananas my connection with them ceased."

The wife of the plaintiff testified that she was not there at the first conversation, but that some two months afterwards she went to defendant's store with her husband, and defendant offered two papers in the English language, which she, being well acquainted with the English language, interpreted to her husband who is not acquainted with it. The substance of these papers was that the bananas were not to be at the risk of the defendant until they were delivered on board, and the plaintiff was to receive his money only after the bananas were delivered on board. She further says that her husband, the plaintiff, refused to sign these papers because he said they differed from the first agreement, and after some conversation defendant tore them up and said, "I suppose you won't cheat me, it is all right between you and me." "When the bananas are on the wharf they are mine, and he (Kapu) can get his money when he wants it." It appears that the plaintiff does not speak the English language, and the defendant does not speak the Hawaiian language.

To oppose this testimony, the defendant introduces his shop-boy (a half-breed Hawaiian), who says he interpreted between the parties on one occasion, and Antone Rosa and plaintiff's wife were there; and he says the defendant said that "he would pay for the bananas when on board the steamer and not before, and when on the wharf they were not his, and the plaintiff said all right;" and farther says, "I know that if the steamer does not come, the sellers do not get their money." He farther says on cross-examination, that he has worked for the defendant three years, and that he interpreted only once about bananas, and Mrs. Kapu was present but Rosa was not.

Now, inasmuch as the steamer had omitted to come but once before, it is evident that he did not have any good basis to form his idea of the custom if the steamer did not come. And again, if Mrs. Kapu was there and Rosa was not, it was the second conversation and not the first that he was a witness to; and it is very certain that the second conversation was touching the papers which the plaintiff refused to sign, for Mr. McInerny in his testimony states that such papers were prepared and offered to plaintiff on that occasion. If it was the first conversation that he was alluding to, and he is mistaken regarding Mrs. Kapu being there, it is clear that the second conversation was the one which would be conclusive upon this point, for on that occasion the point was distinctly put to the plaintiff that the delivery was not to be complete until they were aboard, and he has distinctly refused to accede to the condition.

Kibling, another of the defendant's shop boys, says he does not understand the Hawaiian language; was present at the first conversation, and defendant gave plaintiff distinctly to understand that the bananas were not to be paid for until they were aboard the vessel. The witness could not know what the plaintiff understood, because he didn't understand his language, but his testimony would not cover the point, because it would not cover the second conversation, and besides that, it does not cover the point of delivery and receipt because it is very practicable that the delivery and receipt might be as plaintiff

avers, and the time for payment be fixed after the sailing of the vessel, as, if I buy a lot of goods and take delivery of them and promise to pay for them after a certain vessel has arrived, which never does arrive, I shall not be absolved from payment.

And this is the whole gist of Rosa's testimony, who says that the money is never paid until they are aboard the vessel; but he does not allude to the second conversation, nor prove in any way that the delivery on the wharf was not agreed to be the delivery to Mr. McNerny. But, says the defendant, Mr. Rosa was not my agent, I pay him no salary. Whether or not a person pays a salary to another has no effect on the question of agency; though, by the way, this defendant says in his testimony that he does give Rosa, from time to time, a dollar or two for his trouble in saving him (the defendant) from staying up nights. He likewise states, in his testimony, that the payment was to be when on board and receipted for by the freight clerk, but he does not meet the averment of plaintiff and his wife that they refused to agree that the delivery was not complete as soon as the bananas were delivered to and counted by the plaintiff's man Rosa. Mr. McNerny further states that Rosa counts for him, brings him receipt for gross numbers, gives him likewise a memorandum of what each grower brings, tickets them to the consignees, which he says are three different parties. Surely this constitutes an agency for the purpose of receiving those bananas.

So that by every rule of law, and by all the evidence, the sale and delivery of the bananas was complete according to the bargain between these two parties; and it made no difference to the plaintiff whether the steamer came or not, his uncontradicted bargain was that when they were delivered at the wharf he was done with them, and therefore let judgment be entered for the plaintiff for \$164.25, and costs of this and lower Courts.

S. B. Dole, for plaintiff.

R. F. Bickerton, for defendant.

Honolulu, January 31st, 1880.

WAILUKU SUGAR CO. *vs.* L. AHOLO, Tax Collector.

ASSUMPSIT. BEFORE HARRIS, C.J.

FEBRUARY, 1880.

Taxes on growing crops of cane, planted on land of a sugar company by outside planters, to be ground on shares, held to be wrongly assessed to the company: the crops being the property of the planters.

DECISION OF HARRIS, C.J.

The petition sets forth that the tax-collector has received to the plaintiff's use \$462.81, for so much money illegally taxed to the plaintiff.

The facts as developed by the testimony are, that the plaintiffs are in possession of a large tract of land, mills, etc., constituting the Wailuku Sugar Plantation. That during the year 1877, they entered into contract with certain persons, namely: William O. Smith, W. H. Cummings, Edward H. Bailey, James C. Bailey and Edwin H. Rodgers, by which the Wailuku Sugar Company agreed with each of these individually to set apart for each of them a certain portion of their land, to be occupied by them for a certain time as yet unexpired, say five years; the land to be held by the lessees on condition that each one should plant the same in sugarcane and keep it cultivated during the time. The company will furnish certain means of cultivation, such as water, oxen or mules and their harness, as well as seed cane, and also to pay all assessments, taxes or rent on the said land; and I pause here to say that I understand the word "taxes" in that connection to be taxes on the land as such, and not on growing crops. The further condition of the agreement is to the effect that when the sugarcane thus cultivated has matured, it shall be delivered to these plaintiffs in the field, carted by them to their mill and manufactured into sugar, and the product to be divided between the parties to the agreement. And the agreement further sets forth

that the property and ownership of the cane and crop, thus planted or to be planted, shall be in Smith or Cummings or Bailey, as the case may be.

In accordance with this agreement as understood by the plaintiffs, they returned for assessment all the acreage of their land and ten acres of growing cane, returning the growing crop at \$50 an acre, in all \$500, in addition to the value of the land itself, which is returned at \$150 an acre. The assessor raised the growing crop to 625 acres, viz.: 230 acres of plant cane and 395 acres of ratoon, assessing the plantcane at \$150 an acre, \$34,500, and the ratoons at \$100 an acre, \$39,500; making the assessment for the growing crop to be on the basis of \$63,130.00, which the Appeal Board reduced to \$61,709.00, thus levying upon the company for all the crop growing under the care of Smith, Cummings, etc. And it is alleged and admitted, that the tax collected on the crop growing under the care of these persons aforesaid, was \$462.81, which the plaintiff company paid to the collector under protest.

Mr. Bailey, the manager, in his testimony points out, in his return, the following item, viz.:

"Cash, bonds and evidences of debt \$30,270.89," which the tax-assessor raised to \$34,000.00, and says that this item includes and represents the amount of advances made by the company to these growers, or in other words, the amount of indebtedness of the growers to the company; so that, by the assessment, the company would be held to pay for the crops produced by these growers, and for the amount of money which they supplied them to produce it as well. And Mr. Bailey farther testifies—and that testimony is uncontradicted—that all the growers except Cummings returned their crops to the tax-assessor to be assessed and taxed to them. And for aught there was made to appear before the Court at the hearing, all the returns were made in sufficient time to enable the tax-assessor to collate and compare them, and assess them to the proper parties.

Under all this showing, I am of opinion that the growing

crop, which is the subject of this controversy, was, at the time of the assessment, not the property of the plaintiff company, but of the growers, and was wrongfully assessed to the company, and therefore give judgment for the plaintiff in the sum of \$462.81.

A. S. Hartwell, for plaintiffs.

Attorney-General Preston, for defendant.

Honolulu, February 11th, 1880.

PALAKE vs. PAAKAULA.

IN EQUITY. BEFORE HARRIS, C.J.

MAY, 1880.

The Court deprecates loose and epistolary pleading, and suggests that practitioners be personally mulcted in costs, as the only way of bringing them to a proper sense of their duty.

Demurrer sustained for loose pleading in the bill.

DECISION OF HARRIS, C.J.

The statements in this bill are not set forth with that precision, the absence of which I have so frequently spoken of; and certainly it would appear to me that practitioners have been admonished so frequently upon this point, that perseverance in a loose and epistolary way of stating their complaint ought to subject them to some inconvenience or punishment; and, indeed, it would appear that the only way of bringing the practitioners to a proper sense of their duty would be to mulct them in costs in such a manner that they could not charge their clients.

The allegations in this bill are such that, if proved, they will be sufficient to set aside this deed. It is said in the demurrer on file, that the bill does not allege any fraud, deceit or other improper conduct on the part of this respondent or other person. The bill does allege that the complainant, whilst

affected by illness and unconscious of his acts, unknowingly signed this deed in question. Now, it would be just as well to have alleged that the defendant, whilst the plaintiff was in such a state, procured that the plaintiff should sign this deed with the intention to defraud the said plaintiff or his heirs; so likewise with regard to the signature, it would be a very simple thing to set forth, as the bill does set forth, the ability of the plaintiff to write, and that the deed is signed by a mark which the plaintiff has no remembrance to have made, and which he alleges was affixed to said deed with intention to defraud.

The third averment in the demurrer is that it does not appear that the defendant knew of the unsoundness of the plaintiff's mind when the deed was delivered. That fact seems to me to be sufficiently set forth in the sentence "that the plaintiff at the time of making said deed was quite unconscious."

The fifth averment in the demurrer is that it does not appear by the said bill that the consideration money mentioned in the deed is not the full value of the premises. This is certainly true, and it would be just as easy to set it forth, but the bill does set forth that the consideration money mentioned was never paid at all.

Upon the whole, therefore, I think that the administration of justice would better be subserved by directing the plaintiff to amend his bill to meet the objections of the demurrer, and the defendant have ten days after the filing of the amended bill to answer.

R. F. Bickerton, for plaintiff.

Castle & Hatch, for defendant.

Honolulu, May 7th, 1880.

WAIAHA (*w.*) vs. NAHLOWAA.

IN EQUITY. BEFORE JUDD, J.

SEPTEMBER, 1880.

While the *bona fide* holder of land, under a title proved to be defective, who has made improvements, may be entitled to recover their value, less rent, from the legal owner: yet, in the case at bar, it appearing that plaintiff made improvements on land to which she had no title, knowing the title was in another, the Court holds that she cannot recover the value of the improvements, notwithstanding that the real owner of the land was aware of the improvements and did not object to their being made, and in spite of the fact that similar cases frequently occur among Hawaiians.

DECISION OF JUDD, J.

This is a bill in equity by Waiaha, widow and devisee of one Kapouhiwa, against Naholowaa, for an account of moneys expended by Kapouhiwa in improvements and buildings on a piece of land situated on Merchant street, between Richard and Alakea streets, in Honolulu.

It is alleged in the bill that Kapouhiwa lived upon this land from the year 1860, claiming title to it, and that the premises were sold by the administrator of the estate of L. Haalelea in 1865; that the administrator's deed conveyed the property to one Naholowaa, who asserted no claim to it until October, 1879, when (Pouhiwa having died in June previous) he brought an action of ejectment against the petitioner and recovered judgment for possession of the premises.

On the 30th of October, 1879, this petitioner brought a bill in equity alleging that Kapouhiwa paid the consideration in the deed, \$400, and that Naholowaa's name was inserted therein as the grantee, but as trustee for Kapouhiwa, and praying for a cancellation of said deed or reconveyance of the property to the petitioner.

The Court took evidence and dismissed the bill, the allegations not being proved.

To the bill at present before the Court the defendant has demurred on the ground that it discloses no title in the petitioner to said land, either legal or equitable, and also no allegation of fraud or deception on the part of Naholowaa, etc.

The judgments in the ejectment suit and the former equity suit are pleaded in bar.

This case is embarrassing to the Court, inasmuch as the petitioner's case is complicated by former proceedings. She allowed herself to be defaulted in the ejectment suit, whereas she might have defended it and have endeavored to prove such facts as might constitute an equitable estoppel against Naholowaa's assertion of his title, or she might have asserted her claim for the improvements.

Judge Story says, in *Bright vs. Boyd*, 1 Story, 478: "In cases where the true owner of the estate, after a recovery thereof at law from the *bona fide* possessor for a valuable consideration without notice, seeks an account in equity, as plaintiff, against such possessor for the rents and profits, it is the constant habit of Courts of Equity to allow such possessor (as defendant) to deduct therefrom the full amount of all the meliorations and improvements which he has beneficially made upon the estate, and thus to recoup them from the rents and profits." In this country the claim for mesne profits may be made at the same time with the action of ejectment, and I see no reason why the defendant, if he is a *bona fide* possessor for a valuable consideration without notice, may not recover for the improvements made on the estate beneficial to the true owner; however, if they should exceed the rents and profits during the period of occupation, it is not settled that he can recover the excess.

Or the petitioner could immediately, on the ejectment suit being filed, have invoked the aid of equity to enforce her supposed equitable title in aid of her possession and procured an injunction staying the proceedings in the suit at law until a result had been reached in the equity suit.

Story says that "If the true owner of an estate holds only an equitable title thereto and seeks the aid of a Court of Equity to enforce that title, the Court will administer that aid only upon the terms of making compensation to such *bona fide* possessor for the amount of his meliorations and improvements of the estate, beneficial to the true owner." This is upon the maxim that he who seeks equity must do equity.

The case before us is quite different; Naholowaa held the legal title and was out of the possession of the estate, and it was Kapouhiwa who made the improvements. But had she prevailed in this equity suit she would have maintained her possession of the land with the improvements upon it.

Chancellor Walworth, in *Putnam vs. Ritchie*, 6th Paige, 403, says: "I am not aware that the law of any civilized country has directly deprived the legal owner of property of the natural accession to the same. By the rules of the civil law, the possessor of the property of another who had erected buildings or made other improvements thereon in good faith, supposing himself to be the owner, was entitled to payment for such improvements, after deducting from the value thereof a fair compensation for the rents or use of the property during the time he occupied it. This principle of natural equity has been adopted by the law of England and of this state to a limited extent, in the action for mesne profits, where the *bona fide* possessor of property is permitted to offset, or recoup in damages, the improvements he has made upon the land, to the extent of the value of the rents and profits during his occupancy."

The Chancellor says further, "I have not, however, been able to find any case either in this country or in England, wherein the Court of Chancery has assumed jurisdiction to give relief to a complainant who has made improvements upon the land, the legal title to which was in the defendant, where there has been neither fraud or acquiescence on the part of the latter after he had knowledge of his legal rights.

I do not, therefore, feel myself authorized to introduce a new

principle into the law of this Court without the sanction of the Legislature, which principle on its application to future cases might be productive of more injury than benefit."

In 2 Story Eq. Jur., §799b, it is laid down as follows: "It has been sometimes thought, as a matter of justice, that Courts ought to go further, and in favor of a *bona fide* possessor of the land, whose title is defective, to decree compensation for the improvements made by him upon the land, in good faith, against the true owner, who asserts his title to it. The civil law seems to have adopted this broad doctrine where the improvements were made by a *bona fide* possessor without notice of any adverse title. * * But Courts of Equity seem not to have gone to this extent, but to have confined themselves simply to the administration of the equity, in cases where their aid has been invoked by the true owner in support of his equitable claims. They have never enforced, in a direct suit by the *bona fide* possessor, his claim to meliorations of the property, from which he has been evicted by the true owner."

Judge Story, though reluctant to be the first judge to lead to such a decision, asserted in *Bright vs. Boyd* that "the denial of all compensation to such *bona fide* purchaser in such a case where he has manifestly added to the permanent value of an estate by his meliorations and improvements, without the slightest suspicion of any infirmity in his own title, is contrary to the first principles of equity." In this Kingdom we would not hesitate to incorporate into our decisions a beneficial principle because it came from the civil law, for Section 823 of the Civil Code expressly authorizes this, and, in a state of facts strictly warranting it, we might adopt it. But by a careful examination of the petitioner's case I am unable to see that she is now in a position to expect this relief. She failed in her former suit in equity to show an equitable title to the land or that Naholowaa was Kapouhiwa's trustee. An examination of that case makes it clear that she failed to show that Kapouhiwa paid the purchase-money for the lands. Nor is she in the attitude of one in the case suggested by Judge Story.

The administrator's sale, it must be presumed, was made

publicly, and therefore known to Kapouhiwa, and the petitioner cannot say that the improvements were made *bona fide* and without knowledge or suspicion of the legal title being in Naholowaa.

There is no fraud or deceit on the part of Naholowaa suggested in the bill.

We have, then, the naked question of a person not a purchaser for a valuable consideration after the true owner has recovered possession, claiming for improvements made on the land with knowledge that the title was in another. Is such a person entitled to relief? The only point in her favor is the apparent acquiescence of Naholowaa in the expenditures made on his land. But it does not seem to me that a person is bound to object to improvements being made on his land, where the facts show that the occupier had knowledge of the true title, and where there is no fraud or deception alleged or shown.

The frequency with which similar cases occur among Hawaiians does not afford to my mind an argument in favor of relieving them. It is far better to found our decisions on rules of equity and justice which have been ascertained by long experience in other countries to be wise and good, than to make exceptions in cases of hardship which might make general shipwreck of the law.

I do not say that the petitioner, if allowed, would succeed in proving an equitable title to the land, and that the improvements were made by her husband in good faith upon it without notice of any adverse title; I mean that she is not now in a position to offer to prove it, for by the form of her case she has been obliged to allege in her bill that she failed to show this state of facts in the former case, and that she has, in fact, no title. That question is *res adjudicata*, and she cannot now adduce evidence to rebut the presumption that notice of the title being in Naholowaa was brought home to Kapouhiwa.

I am obliged to sustain the demurrer.

Castle & Hatch, for petitioner.

A. S. Hartwell, for respondent.

Honolulu, September 24th, 1880.

E. P. ADAMS & C. S. BARTOW *vs.* W. C. PARKE,
Commissioner, etc.

IN EQUITY. BEFORE JUDD, J.

JANUARY, 1881.

A Court of Equity may enquire into the jurisdiction of a Court of Probate, although both jurisdictions are exercised by Judges of the same Court.

A commissioner, appointed by a Probate Court to partition and sell at public auction real estate of a decedent, is not obliged to hire a licensed auctioneer to conduct the sale, but may do it himself.

The Court refuses to grant an injunction to restrain the sale by the commissioner, upon the prayer of plaintiffs, who are the only licensed auctioneers in Honolulu, although not in partnership.

DECISION OF JUDD, J.

The plaintiffs aver that they are the only auctioneers licensed for the Island of Oahu, and that the respondent is intending to sell a large quantity of land on the 31st January, at public auction, which the plaintiffs urge is an infringement of their rights. The respondent has pleaded the order of the Chief Justice authorizing him to sell the land in question, as commissioner in partition of the estate of Charles Kanaina, deceased. The statutes of this Kingdom impose a penalty upon whoever, not being a licensed auctioneer, shall sell any property at public auction, and a commissioner in partition is not specifically mentioned among those to whom the statute shall not be held to apply.

The first question is whether the plaintiffs have such an interest in this matter as to entitle them to ask for an injunction to restrain the respondent from making the sale.

It is urged by the respondent that the application of only one of the plaintiffs would not be sufficient, for it would not be apparent that he would receive the commission to sell this estate if it was to be sold by a licensed auctioneer, and there-

fore he would not be liable to be damaged; and further, that the two licensed auctioneers have not a joint interest in the subject of this suit so as to entitle them to sue jointly, because they do not share the commissions.

I am of the opinion that it is sufficient that all the parties whose interests are alleged to be affected are plaintiffs, that is, that all the licensed auctioneers of this island join in the bill.

It is further urged that equity cannot enjoin the exercise of a particular privilege by an unlicensed person when the statute provides ample means for its prevention by a penalty; and it is suggested that the allowance of this injunction would cover the case of traders at wholesale or retail, who, if unlicensed, could by parity of reasoning be restrained from thus trading on the application of the licensed traders for an injunction.

The only damage to themselves that such petitioners could allege would be that the unlicensed dealers, other things being equal, could undersell them by the amount saved in expenses by not paying for a license. But "other things are not equal," for there are many other matters that enter into the case which give the advantage to one person over another in trade, as a superior location, for instance, and such a matter as this is not an injury to any other merchant.

The Government desired to make revenue from licensing such businesses, and, to secure the result that all persons thus desiring to deal shall take out a license, has imposed a penalty on whoever shall sell at wholesale or at retail without licenses. No one person who is licensed can be damaged pecuniarily by any one other person who sells without a license, and therefore, this cannot be claimed in behalf of any number or the whole number of those who are licensed.

With the case of auctioneers it is somewhat different. If the law allowed but two to exercise this business, and these two joined in this petition, there would be more reason in their claim, for the amount by which they might be damaged could be ascertained, it being the amount of commissions illegally received by the unlicensed auctioneer. But the question of

apportionment between them would remain, and as we have seen, their interest is not joint.

The case of a private or public nuisance, where a right to petition for an injunction exists, is not analogous. I am aware that where a franchise is granted by the State which is infringed upon, an injunction would lie—but the franchise must be an exclusive one by law, so that the infringement would be a clear trespass upon the title. If even between the filing of this petition and the day of sale, there should be other auctioneer's license granted, the prayer of the petition would not be granted, because then it would not be certain but that the sale might be made through the newly-licensed auctioneer, and in such case it is clear the plaintiffs could not complain.

I have grave doubts as to the right of the petitioners to the relief prayed for, because, as I have said, it is not apparent that they will suffer damage, and the law has provided what the Legislature has considered ample means of protection by prescribing punishment against persons plying this vocation without a license.

The plea sets forth in full an order of the Chief Justice of this Court, dated 6th January, 1880, by which it appears that the respondent was appointed a commissioner in partition in an estate in course of probate, and that he was therein ordered to sell at public auction the remaining estate of the deceased, in order that the proceeds might be divided among the heirs, it appearing to the Court that partition could not be made without great prejudice to the parties interested.

I do not admit that a Court of Equity, such as is now invoked, is bound to respect whatever order or decree a Court of Probate may make without inquiring into its authority or jurisdiction. The fact that these widely differing jurisdictions are exercised by the different judges of one and the same Court, does not take away from the judge exercising the equity powers conferred by law upon it, the authority to examine into the decree made by the Probate Judge.

But on examination into the authority to make the order

pleaded I find it ample. Section 852 of the Civil Code confers upon a judge of this Court at Chambers the authority to order a sale under the circumstances described. The Court cannot be expected to act as salesman, conveyancer or auctioneer. It must act through some one. In this section, as in many others of our somewhat meagre Code, the authority is given and it is left to the Court either by general rule or the practice in particular cases to prescribe the method and means by which this authority shall be enforced or carried out. It is evident that this sale must be by auction, to ensure public competition and a prompt settlement of the estate.

It is to be presumed that the Legislature intended to confer upon the Court the authority necessary to enable it to enforce its orders, and this, too, through officers of its own appointment, so that it can be certain that they will be executed. If the Court were limited by the statute to make all the sales ordered by it through licensed auctioneers, the estate sold would be liable to charges over which the Court would have no supervision, and there could be instances imagined in which, as in case of illness or absence of the licensed auctioneers, the Court might not be able to enforce its decrees for want of an auctioneer.

There is indeed nothing to prevent a commissioner in partition, as also executors, guardians or other officers of the Court, or persons acting under its authority, from selling through an auctioneer, providing the expenses are not thereby increased, and in many cases it would be to the advantage of the estate to make the sale in this way.

But to admit that the Court has the power to enforce a sale of an estate at public auction, and to hold that such a sale must be made through a person, not its officer, and not amenable to its authority, would not be consistent.

I think the bill should be dismissed.

S. B. Dole, for plaintiffs.

E. Preston, for respondent.

Honolulu, January 29th, 1881.

HANNAH K. ADAMS *et al.* vs. KAUWA.

EJECTMENT. BEFORE HARRIS, C.J.

JANUARY TERM, 1881.

Houses, built on land by the husband of a tenant in fee, are fixtures.

A house resting on stones held not to be a fixture.

A house built by a father on his son's land held, under the circumstances, not to be a fixture.

Plaintiffs having recovered certain land by a suit in ejectment, and there being a crop of taro on the land; held, that so much of the crop as was planted by the father of the owner of the land, before the owner's death, goes to the father, the remainder to plaintiffs.

DECISION OF HARRIS, C.J., ON MOTION TO STAY EXECUTION.

The question in my mind depends entirely upon whether the houses are fixtures, because if the houses are fixtures, by all the authorities, they become a part of realty; for the husband having built the houses in the lifetime of his wife, cannot be said to have any contract with his wife for the removal; and, if they are fixtures and the builder had an interest in the land, such as being a husband to the tenant in fee, as in this case, they become a part of the realty and go to the heir. *Glidden vs. Bennett*, 43 N. H. 306.

Now, by all the authorities, the first house is not a fixture, it resting on the stones, which stones rest on the earth; and therefore it was personal property when put there, and continued as such ever afterward, subject to being removed, when Kauwa's right of tenancy determined. *Antoni vs. Belknap*, 102 Mass. 200.

My judgment therefore is, that the defendant, Kauwa, have the right to remove that house.

And the same with the second house, because that, although the second house was placed on the land after the death of Kole, it was during the lifetime of Pine, for whom Kauwa was virtual

guardian, and Pine was the owner of the land after the death of his mother, so that Kauwa was not a trespasser, at least against these parties, in putting the house on the land.

The third house belongs to realty by all the authorities, and must go with the realty.

Regarding the crop; there is no evidence particularly as to when Pine died, but the whole tendency of the evidence is that he died within the last year.

My judgment therefore is, that so much of the crop as was planted before Pine died, shall go to the defendant: that which was planted after Pine died must go to the plaintiff.

Mr. Davidson for plaintiffs.

Mr. Hartwell for defendant.

Honolulu, February 3d, 1881.

C. ASING vs. C. Y. AIONA.

IN EQUITY. BEFORE McCULLY, J.

FEBRUARY, 1881.

The subjects enumerated as being within equity jurisdiction by the Statute of 1878 (Compiled Laws, page 389) are thus made matters for Equity, and the Statute finds that there is not an adequate remedy for them at common law.

"Suits between co-partners" being one of the subjects mentioned, it is not necessary for plaintiff, in a suit for dissolution of partnership, to aver that he has not an adequate remedy at common law: nor need he aver that an accounting will show a balance in his favor, for he is equally entitled to know if he is liable for indebtedness of the firm.

Demurrer overruled.

DECISION OF McCULLY, J.

Without making abstract of the bill and demurrer, I remark:

The Statute of 1878, Chap. XV., Sec. 2 provides that the Supreme Court and the several Justices thereof may hear and

determine in equity *all cases* hereinafter mentioned when the parties have not a plain, adequate and complete remedy at the common law, that is to say; and proceeds to enumerate a list of matters, most of them of a character to admit of no question that they belong solely to equity jurisdiction, the first being "suits for the redemption of mortgages or to foreclose the same," the second, "suits and proceedings for enforcing and regulating the execution of trusts." My inference is that the enumerated matters which are placed in such jurisdiction are thus by the statute made matters for equity, and that the statute finds that there is not a plain, adequate and complete remedy for them at the common law. Among the enumerated matters are "suits between co-partners." As, then, the statute declares that such suits may be brought in equity, it will be not necessary to allege that the case is one where there is no plain, adequate and complete remedy at law, as a formal averment, since the complaint shows that it is a suit between partners. Moreover, the complaint shows that a complete and adequate remedy cannot be had at law, since it prays for a dissolution of the co-partnership, the sale of the property and the division of proceeds, for the production in Court of the partnership agreement and of the agreement by the partners with Mr. Afong, as well as all books and papers, for an account of all receipts and expenses.

The complainant on his part states the amount of money which he has furnished, and avers his demand upon his partner for such an account as he now invokes the aid of this Court to procure. He equally asks for relief such as the discovery prayed for may entitle him to, and the relief is clearly a matter of equitable jurisdiction.

And I am of opinion that he is entitled to the aid of this Court in obtaining a final account without the averment that such account will show a balance in his favor. The allegation that he has contributed \$3,234 to the enterprise and that two crops of cane have been taken off, of which he has had no account, imply that he may expect something upon a settlement of accounts, and I think he is none the less entitled to know it if he is liable for indebtedness of the firm.

As no relief is prayed for against Afong, he, Afong, needs not to be made a party to this suit between co-partners.

The bill as it stands appears to me to state a matter for the cognizance of a Court of Equity, and for no other jurisdiction. And the demurrer is *overruled*.

Castle & Hatch, for plaintiff.

A. S. Hartwell, for defendant.

Honolulu, February 9, 1881.

JOHN PETERSON, Master of Steamer Septima vs. H. A. P.

CARTER, President of Board of Health.

MANDAMUS. BEFORE HARRIS, C.J.

MARCH, 1881.

A steamer, with Chinese passengers, two of whom had the small-pox, arrived at Honolulu, and the passengers were landed and placed in quarantine: the Board of Health declined to allow the vessel to depart, until a bond was given to cover all expenses incurred by the Board of Health: the Master admitted his liability for the two sick passengers, but claimed that the ship was not liable for the others:

Held, the steamer was liable for the expenses of all the passengers landed, and the action of the Board of Health, in requiring a bond, was proper.

DECISION OF HARRIS, C.J.

The steamship Septima arrived at Honolulu on the 13th day of February, 1881, twenty-four days from Canton in China, having on board 711 passengers, two of whom at least were sick with small-pox at the time of their arrival. The ship was immediately placed in quarantine, and the sick people taken from her. The port physician, Doctor Hutchinson, seeing that the ship was a small one, the weather very warm, and the ship exceedingly crowded and filthy on account of the large number of passengers, and that it was impossible to cleanse the ship with

so large a number of people on board, was of the opinion that, besides the small-pox, there was great danger a fever would be generated, which would be fatal to the passengers and dangerous generally to the public health, and gave warning thereof to the health authorities on shore, as well as to those having charge of the ship and passengers.

The result was that temporary accommodations were provided by persons interested in the ship or passengers (not by the Government) on the small island at the entrance of the harbor, known as the quarantine ground, and the passengers were landed, by the order of the President of the Board of Health, on the 23d of February. The passengers, as well as the ship, have since remained in quarantine, under the supervision of the Board of Health and are so at the time of this hearing. Since the arrival of the ship, two more cases have appeared among the passengers, and one of the crew is now sick of the small-pox, on board the ship.

The petition sets forth that they are ready and willing to pay all expenses which may have been incurred by the Board of Health, for the two persons brought into the harbor, sick, on board said ship, but that the defendant declines to allow the Collector-General of Customs to enter and clear the ship, unless ten thousand dollars be deposited as security, or in lieu thereof a bond of indemnity in the penal sum of ten thousand dollars, conditioned that said Board of Health shall be repaid and indemnified for all moneys which shall or may be expended, by the said Board of Health, for any of the said passengers. It further appears that there is a small amount of cargo on board of said ship, destined for this port. It is indisputably in evidence, that at the time of landing the passengers, as aforesaid, and before and several times since, those in charge of the interests of the vessel were told by the health authorities that the vessel would be held responsible for all expenses incurred.

The petitioner requests that the respondent may be ordered to allow him to enter and clear his vessel at the Custom House, on receiving the sum which may have been expended for the

two persons, actually sick, on board his ship, at the day of her arrival, and, in the course of the argument, admits that the ship is likewise liable to pay whatever expenses may have occurred for purifying and disinfecting her.

Respondent says he is willing to permit the ship to be entered and cleared, provided that he shall receive a good and sufficient bond to reimburse the Board of Health for all costs and expenditure necessary for landing, supporting and sustaining the passengers who came by the said ship, as well as the cost of guarding and disinfecting her.

The law applicable to this case is as follows: Sec. 296 Civil Code. "The Board of Health and its agents may at all times cause any vessel arriving, when such vessel, or the cargo thereof, shall, in their opinion, be foul or infected, so as to endanger the public health, to be removed to the quarantine ground, and to be thoroughly purified at the expense of the owners, consignees, or persons in possession of the same; and they may also cause all persons arriving in, or going on board of any such infected vessel, or handling such infected cargo, to be removed to some place of safety, there to remain under their orders."

This section clearly gives the authority to the Board of Health to remove *all* persons, arriving in an infected vessel, to a place of safety, there to remain under their orders. It likewise gives authority to cause the vessel to be purified at the expense of the owners; if to be purified, then to do all things necessary in the premises; and it was necessary to remove this large crowd of passengers. This work was clearly done for account of the ship, and, by Sec. 298, all expenses incurred on account of any person, vessel or goods, under any quarantine regulations, shall be paid by such person, vessel, or owner of such vessel or goods respectively. The construction sought to be placed on this section by the counsel for the petitioner is, that the ship has to pay for what is done for her, and human beings to pay for what is done for them. In this view of the case, the ship would not be liable for the two sick men for whose care they offered to pay, or for the care of her crew; the fact is that all the work is done for the ship, but instead of compelling her to remain here, and keep her passen-

gers on board, the passengers are placed where they can be better cared for. By this section of the law, where expenses are incurred for any person outside of and irrespective of any ship, then they must look to the person, but it does not nullify the responsibility of the ship for her passengers and her crew.

Sec. 306 reads as follows: In case any moneys are expended by the Board of Health, for any sick person brought into this Kingdom, in any vessel from abroad, it shall be the duty of said Board, or its agent, to demand the same from the master of the vessel in which such sick person was brought, and the Collector of Customs shall not grant a clearance to such vessel, until the same is paid. The master of such vessel shall be liable for the amount of the moneys thus expended.

The petitioner says that this Statute limits the liability of the ship to those persons who are actually suffering from the disease, that is, to the two persons above alluded to. Properly speaking, in view of the public health, all these persons are sick; that is to say, they are all infected and liable to break out with the small-pox and communicate it to others.

All the sections must be taken together, and the obvious and only conclusion from them all is that the ship is liable for all the expenses which have been or may be incurred by reason of the contagious disease with which her passengers were infected on her arrival at this port.

I must therefore decline to grant the order asked for at present. But inasmuch as the matter is now in the hands of the Court, I will grant such an order whensoever a good and sufficient bond may be filed to indemnify and reimburse the Board of Health for all moneys that have been or may be expended in the premises; and I do not think that the penal sum of ten thousand dollars is unreasonable in view of the fact that only so much will be obliged to be paid on the said bond as may be shown to be actually expended.

Mr. Hartwell, for petitioner.

Messrs. Castle & Hatch, for the sub-charterers, Hin Wo Tai.

Mr. Davidson, for respondent.

Honolulu, March 4th, 1881.

BANKRUPTCY OF CHING ON & CO.

BEFORE JUDD, J.

MAY, 1881.

A landlord's claim for rent is a lien on a bankrupt's estate, and has priority over ordinary debts.

DECISION OF JUDD, J.

In this case it appears that at the time that the property of Ching On & Co. was seized by the Marshal under the order in bankruptcy, this firm owed Gilbert Waller \$152 for four months' rent of the premises occupied by them.

Before the assignees were elected, Mr. Waller appeared before the Court and filed a claim stating that the property seized by the Marshal is subject to a lien to him for the rent aforesaid, and he moved that this sum of money be paid to him from the proceeds of this property, or that the property be restored to him.

His attorneys contend that the Act of the 10th January, 1865, entitled, "An Act to Facilitate the Recovery of Rents," gives the landlord a lien for rent upon the goods or chattels of the tenant upon the premises. Section 2 provides that no goods or chattels of any tenant shall be liable to be taken on execution on any pretence whatsoever, unless all arrears of rent are paid, and that therefore a lien is created in favor of the landlord, which is good against all persons, including the assignees in bankruptcy, and that the lien can only be discharged by the payment of the rent. The petitioning creditors contend that the goods are now in the custody of the law, and as the landlord did not distrain the goods before the bankruptcy of his tenant, he has lost his remedy, for the goods are now out of his possession.

The question is this: Does the Act of 1865 create a lien?

In a case reported in the 4th National Bankruptcy Register Reports, page 23, (*In re Wynne*) a similar case came before

Chief Justice Chase, of the United States Circuit Court. The learned judge says: "Liens are of various descriptions, and may be enforced in different ways, but we think it sufficient to say here what seems to us well warranted in principle and authority, that whenever the law gives a creditor a right to have a debt satisfied from the proceeds of property, or before the property can be otherwise disposed of, it gives a lien on such property to secure the payment of this debt." In that case the act relied upon as creating the lien was a law of the State of Virginia, which "prohibits any person having by deed of trust, mortgage or otherwise, a lien upon the goods of a tenant on demised premises, from removing such goods without paying to the landlord the rent due."

Taking the Chief Justice's definition of a lien in our case, the law gives the particular creditor (Waller) a right to have his debt satisfied before the property can be otherwise disposed of, and it therefore gives him a lien on this property to secure the payment of this debt.

The assignees in bankruptcy take the property in the same plight in which it was held by the bankrupt when the petition was filed, subject to such liens or incumbrances as would affect it if no adjudication in bankruptcy had taken place. *In re Wynne*, above quoted, page 25.

It is clear to my mind that the lien still exists, and therefore it must be disposed of by payment of the claim before the goods of the bankrupt can be available for the general creditors. I do not see any analogy between the landlord's lien and an execution or attachment laid upon the bankrupt's property after an act of bankruptcy.

I order that the claim of Waller be paid to him in full by the assignees when elected, from the proceeds of the property.

A. S. Hartwell, for petitioning creditors.

Messrs. Castle & Hatch, for Waller.

Honolulu, May 25th, 1881.

N. B.—See decision of Full Court in *Bankruptcy of On Chong*. July Term, 1888.

ESTATE OF HENRY GORDON, Deceased.

IN PROBATE. BEFORE MCCULLY, J.

JUNE, 1881.

A wife was under the age required by law at her marriage, and died before she reached that age: held, the marriage was not void but voidable, and the voidability ceased upon the wife's death: the husband, therefore, is entitled to all his rights in the wife's estate.

DECISION OF MCCULLY, J.

In proceedings on the distribution of the estate to the heirs at law, one Anin claimed to be entitled to take a share as the husband of Emmeline, deceased, a daughter of the intestate. The claim of Anin is contested on the ground that his marriage was not valid for the reason that Emmeline was under the age of fourteen when married. The marriage was solemnized in August 1880, when she was of the age of twelve, and she died of smallpox in March 1881, being yet under fourteen years of age.

The 1284th section of the Civil Code, as amended in 1872, reads as follows: "In order to validate the marriage contract, it shall be necessary that the respective parties be not to each other within the fourth degree of consanguinity; that the male shall, at the time of contracting the marriage, be at least seventeen years of age, and the female at least fourteen years of age; that the man shall not have at the time a wife living; and that the woman shall not have at the time a husband living. It shall also be necessary to validate the marriage of native female subjects of these islands, with male foreigners coming here to reside, that the foreigners have become first duly naturalized by taking the oath of allegiance, and it shall in no case be lawful to marry in this Kingdom without license for that purpose first obtained from the agent duly authorized to grant licenses to marry, agreeably to the laws."

The 1313th section provides that a marriage may be declared

null for corresponding causes, among them is "2d, that the parties or either of them had not attained the legal age of marriage." And in the 1314th section, that "a suit to annul marriage on the ground that one of the parties was under legal age may be brought by the parent or guardian entitled to the custody of such minor or by any person admitted by the Court to prosecute as the friend of such minor; but in no case shall such marriage be annulled on the application of a party who was of legal age at the time it was contracted, nor when it shall appear that the parties, after they attained the legal age, had for any time freely cohabited as man and wife."

The claimant contends that his marriage was not void but merely voidable, if a suit should be brought to annul it in the lifetime of his wife, and if she should not have cohabited freely and voluntarily with him after attaining the age of 14 years, and that as she has died without such annulment, whereby no annulment suit can be brought, he must hold the relationship of husband for the purpose of taking of her estate.

The reason of the statute, which provides that a suit for annulment shall not be brought by the party who was of age to marry, is plain, that he shall not take advantage of his own wrong. The marriage then may be confirmed, that is, completed and made valid by voluntary cohabitation after reaching the legal age, without another solemnization. The provision for bringing suit for annulment is only limited by the negative of the party who was of age. Parents, guardians or any person admitted by the Court, may bring the suit on behalf of the minor. Upon the judicial determination of the fact of nonage, the Court finds that the marriage was null, *ab initio*, that it had never been a valid marriage. And in this connection it may be observed that a penal statute enacted in 1864, subsequent to the provisions of the Civil Code above cited, makes sexual intercourse with any female of this Kingdom under the age of fourteen years an offence punishable by imprisonment at hard labor not less than three nor more than eighteen months, with no exceptions in favor of marriage.

Under the proceedings in a Probate Court it becomes necessary to determine an alleged fact of marriage. If Anin takes in the distribution of this estate, it is because he was legally married to Emmeline Gordon. He can only take on proof of a legal union with her. This Court must ascertain if he stands in an inheriting relationship, as well if he claims it by marriage as if the claim were by consanguinity. There can be no doubt that the question can be raised by any person interested in the distribution, and it has been raised in this case. The claimant argues that this marriage differs from some other invalid marriages, in that it may become valid by lapse of time with the continued consent of the minor, while a marriage between parties within the prohibited degrees, say of brother and sister, must always be invalid; and a marriage which was bigamy in the beginning would not be validated by the death or divorce of the first husband or wife; and that this is therefore a valid marriage until it is pronounced invalid in a Court entertaining divorce matters. If this proposition is granted to be true, so far as the status of the parties *inter sese* is concerned, and that their cohabitation could not be treated as illicit and adulterous, it is necessary now to pronounce affirmatively or negatively upon the legality of the marriage as it stood at the date of the death of Emmeline. There was a potentiality of a valid marriage here, that is, if Emmeline survived to the age of fourteen and continued of a mind to keep Anin for a husband. By Section 1319, upon the annulment of a marriage on account of nonage, the issue shall be deemed to be in all respects the legitimate issue of the parent who at the time of the marriage was capable of contracting, leaving the legitimacy as to the other parent subject perhaps to the same result as to the marriage itself. In view of the above cited statute provisions, what is the force of the phrase, "In order to make valid the marriage contract, it shall be necessary, etc.?" It is clear that such a marriage is not simply void and without legal force, for the party who is of age is married as to the other party who is under age and as to their issue which is legitimate to him. And it is clear that the

marriage binds the minor until he or she dissent, being yet under the age of consent. It is made a valid marriage by mere consent and cohabitation after arriving at age, without a new solemnization on a new license granted by an agent to grant marriage licenses. The previous ceremony and license are the license and ceremony which have married them, for the law of this Kingdom does not recognize a union by *verba de presenti*.

There is a clear distinction drawn in the statutes between marriages void and voidable, but they are alike in this respect, that the fact on which a decree of nullity may be founded is one existing at the date of the marriage, and it is nothing depending on the conduct of the parties. Thus, the fact of having an undivorced wife or husband living at the time of marriage has only to be found by the Court to procure a decree, although the previous husband or wife may have died or been divorced since the second marriage. A marriage incestuous, even without the knowledge of the parties contracting it, must be dissolved whenever the fact appears to the Court.

But a marriage voidable from nonage cannot be made void by the party of age, and it may be confirmed by the minor. The defect is curable.

The phrase "to make valid," must then be understood to be consistent with the difference between void marriage and voidable marriage—as to the latter it implies only that there is an existing condition which may procure an annulment of the contract.

Counsel for the heirs cite the case of *Fornhill vs. Murray*, from Vol. 18 of American Decisions, a case heard by Bland, Chancellor of Maryland. It is an action against an administrator, wherein several persons claim as the children of one Mary, a sister of decedent. Against their claim it is set up that they were illegitimate, for the reason that their mother, at the date of her marriage, had a lawful husband living in Ireland, whom she had deserted. The Court finds that, by the English rule, the validity of a marriage which is not absolutely void, but merely voidable, can only be drawn in question and

determined in a suit instituted for that purpose in the Ecclesiastical Court, which, of course, can only be done in the lifetime of the parties, as, by the death of husband or wife, the marriage is at an end, and that thereafter no judicial proceeding can be had in any Court for the purpose of declaring such a marriage null and void, for the purpose of bastardizing the issue of such marriage, or barring the husband of his curtesy or the widow of her dower. Co. Litt. 33. The Court would not, therefore, entertain a proceeding to bastardize the issue of the said Mary. But when the issue claim and found their title to recover essentially upon the validity of the marriage and their own legitimacy, it has never been questioned that the Court might inquire into and decide upon the validity of the marriage or the fact of legitimacy; and thus accordingly the Court held that as the marriage in question was not voidable but void, the issue of it could not take of the estate.

But there should be a difference between a marriage "utterly void," as in the case cited, and a marriage merely voidable. This marriage was invalid only in that there was in it a fact, namely, want of age, upon which it could be made void, but it had not been so made.

Following the cases cited in *Fornhill vs. Murray*, by the death of Emmeline the marriage is at an end and cannot be annulled. The voidability of the marriage has closed by the death.

If this proposition is correct, it follows that Anin remains with the rights of a husband in his wife's estate.

And it is ordered that Anin do take, as the husband surviving, and without issue, of the said Emmeline Gordon, deceased.

A. S. Hartwell, for Anin.

Castle & Hatch, for the heirs of Henry Gordon.

April 21, 1881.

THE STEAMER MEE FOO.

IN ADMIRALTY. BEFORE JUDD, J.

JUNE, 1881.

A steamer having been libelled for quarantine expenses, a bond was given for her release, upon which a common law action was brought; the next arrival of the steamer, she was again libelled for the same cause of action:

Held, that as the common law suit was still pending, and the Admiralty suit was for the same cause of action, the latter must abate.

DECISION OF JUDD, J.

This is a libel and information in Admiralty by the Attorney-General against the Chinese steamship Mee Foo, her tackle, apparel and furniture, alleging that this steamship arrived in the port of Honolulu on the 2d of February last, with a large number of Chinese passengers on board, some of whom were ill and suffering from the infectious and dangerous disease of small-pox, and that, thereupon, the vessel, her crew and passengers were placed in quarantine by the Board of Health. That, thereupon, the vessel became liable to the Board of Health and the Government to pay all the expenses incurred by them in consequence of the quarantine; that, in order that the vessel might proceed on her voyage to San Francisco, it was agreed that she might be released on condition that the agents of the steamship, Messrs. Sing Chong & Co., and one Loo Ngawk, should enter into a bond to the Minister of the Interior, and the President of the Board of Health, in the sum of eight thousand dollars, to become void on the payment on demand of all expenses that might be incurred by the obligee of the bond, as he might deem reasonable and proper, in consequence of the existence on, or by reason of the introduction of, the small-pox by the said steamship. That the bond was executed and the steamship released.

That the Board of Health have expended the sum of \$5,119.50 in consequence of the quarantine, and payment of this sum has been demanded from the obligors of the bond, who have refused to pay. That the said steamship has returned to and is now in the port of Honolulu, and is by law charged with and liable to pay this demand. The prayer is for attachment, for decree for the said sum of \$5,119.50, and that the ship be condemned and sold to pay this sum and costs. The vessel was attached, and released on the filing of a satisfactory bond. The answer of the Master, among other things, alleges that the libellant in this case did, on the 5th day of May, bring an action in the Supreme Court against Sing Chong & Co. to recover the said sum of \$5,119.50, to which they have pleaded, and that said action is for the same identical causes of action in this suit mentioned, and prays that the libel may be dismissed.

An inspection of the record of the suit referred to discloses that it is an action by the Minister of the Interior and President of the Board of Health against Sing Chong & Co., and Loo Ngawk, to recover the sum of \$5,119.50 expended by the Board of Health in consequence of the quarantine of the Mee Foo, and for the payment of which the bond of \$8,000 was given by the defendants.

The question is if this libel shall be abated by reason of the pendency of the suit at law.

In 1 Bacon's Abridgment, p. 29, the doctrine of law appears as follows:

"The law abhors multiplicity of actions, and therefore whenever it appears on record that the plaintiff has sued out two writs against the same defendant for the same thing, the second writ shall abate." It is further there said that "the second writ must plainly appear to be for the same thing." In the note to this text it is said: "By the same cause of action is meant what will be supported by the same evidence."

Chitty says, "In general the pendency of a former action must be pleaded in abatement." 1 Chitty, Pl. *454.

In *Commonwealth vs. Churchill*, 5 Mass. 176, Parsons C.J., says:

"It is very well known that a man cannot bring a second action for the same cause for which he has a prior action pending."

The argument is made for the libellant that these actions are not identical, that a bond was given to release the vessel, and that the condition in this bond to pay whatever expenses might be incurred in consequence of the small-pox being on the Mee Foo, has not been fulfilled, and the Government is remitted to its original condition and can now hold the steamship liable, as it could have primarily. It seems to me that the answer to this is the fact that the Government did accept a bond in lieu of holding the vessel and has brought its action on that bond to recover the money, and cannot now assume its original position. Are the actions identical? Both actions are brought by the Government, the first one by the Minister of the Interior and President of the Board of Health for the Government, and the second is a libel and information by the Attorney-General in behalf of the King and Government. The first suit is against the obligors of the bond, who are the agents of the Mee Foo, but who substituted their personal liability in place of the vessel. This libel is against the vessel herself. These differences are technical. The two actions are by the same party, the Government, to recover the same sum of money expended in the same behalf, to-wit, the expenses incurred by the Board of Health in consequence of the presence of the small-pox in the Mee Foo.

To apply the test given in Bacon's Abridgment, the evidence to support one case would support the other.

As I am of opinion that the previous action now pending is for the same thing as the one now before me, the present action must abate.

Decree accordingly.

E. Preston, for libellant.

A. S. Hartwell, for respondent.

Honolulu, June 30th, 1881.

NAWELI, Guardian, etc., *vs.* MARY A. AULD, *et al.*

EJECTMENT. BEFORE JUDD, J.

JULY TERM, 1881.

Under §1287, Civil Code, a wife cannot, without the consent of her husband, alienate her property: and the subsequent death of the husband has no effect to validate such a conveyance.

A deed takes effect from its delivery, and if void then, is void always.

DECISION OF JUDD, J.

This is an action of ejectment for the possession of a tract of land at Kalaepohaku, Kapalama, Oahu; the plaintiff, Naweli, claiming title to one undivided moiety of the premises, for her said wards, by inheritance from Kahawalu, through Hooikaika, father of said minors, and McCandless claims the remaining moiety by purchase from other children of Hooikaika, who is now deceased.

The Jury was waived, and the following agreed statement of facts was filed by the parties:

1st. That one Kahawalu (w.) was seized in fee of the premises in controversy as set forth in the complaint, 1870, having at that time a husband living, Keoni by name.

2d. That on the 28th of March, 1870, said Kahawalu (w.) conveyed certain premises to one Kapule (k.) by deed recorded in Liber 29, on page 470; the said premises so conveyed being the "hapalua ma ka aoao mauka o kuu kuleana aina," and covering all or a portion of the premises in dispute, in which deed she was not joined by her said husband Keoni, who, since the death of Kahawalu, has himself died.

3d. That the said grantee of Kahawalu, Kapule, died without issue, leaving him surviving neither wife nor issue, but a brother Hooikaika, who was his sole heir-at-law; and that said Hooikaika has recently deceased, leaving him surviving his widow Naweli, and as heirs, his six children, Kamoa (k.), and others plaintiffs in this action.

The judgment of the Court is respectfully asked whether upon the deed aforesaid Kapule took the premises therein described in fee; whether said deed was wholly void, or only voidable by the non-joinder of the husband.

The defendant claims title to the said premises by virtue of a deed from Nainoa (k.) dated 13th June, 1870, recorded Liber 30, page 357, conveying to Mary Auld, the wife of defendant, all of his rights in the land of his sister Kahawalu, being the land in dispute.

If the decision of the Honorable Justice presiding shall be that Kapule took nothing by virtue of the said deed, judgment shall be entered for the defendant; if that he did, judgment shall be entered for the plaintiffs, it being understood that no rights of either party are in issue except as relating to the said deed.

BY THE COURT.

The questions for the Court to decide are: 1st. Whether a conveyance by a married woman of her land, her husband not joining, is valid; and 2d. Whether such a deed becomes valid on the death of the husband.

"A wife is not bound by her warranty in a deed which she executes, nor by any covenants contained therein. This is the general common law rule in England and America; for this accords with the principle that married women are incapable of binding themselves by contract." Schouler's Domestic Rel., p. 155.

"Unless restrained by the terms of the settlement, a married woman may, since the Statute of 3 and 4, Wm. IV., Ch. 74, by joining in a deed with her husband convey any interest she has in real estate. Previous to that statute, this was usually done in England by levying a fine, which, as well as recoveries, is abolished by that statute." 1 Washburn, R. P. 281.

Bright, on Husband and Wife, 2d v. p. 38, says: That it is a general rule that deeds of married women are void, but that the husband may by his disclaimer give effect to a deed executed by his wife.

Our own statute on this subject is Sec. 1287 of the Civil Code. "The wife, whether married in pursuance of this article or heretofore, or whether validly married in this Kingdom or in some other country, and residing in this, shall be deemed for all civil purposes to be merged in her husband, and civilly dead. She shall not, without his consent, unless otherwise stipulated by anterior contract, have legal power to make contracts or to alienate and dispose of property, except as hereinafter provided."

The provision is made in following sections for a wife, in the absence of her husband from the Kingdom, becoming a sole trader.

The effect of Sec. 1287 is this: That as the wife cannot, without her husband's consent, make a contract or alienate or dispose of her property, her contracts and conveyances to which her husband does not consent by joining in their execution, are void and convey nothing.

And it follows necessarily that the subsequent death of the husband has no effect to remedy the original defect, for a deed takes effect from its delivery, and if void then it is void always.

Even if a deed of a married woman be delivered as an escrow and the husband die, and the grantee perform the condition, and the person to whom it was delivered gives it to the grantee as the woman's deed, it is void. 2 Bright, p. 38.

This principle of law has been frequently laid down by different judges of this Court.

The deed of Kahawalu to Kapule, in which Keoni the husband of Kahawalu did not join, is void, and the grantees' heir-at-law, Kahooikaika, took nothing by it. Judgment for defendants.

Castle & Hatch, for plaintiffs.

E. Preston, for defendants.

Honolulu, July 22d, 1881.

L. B. KERR *vs.* HYMAN BROTHERS.

DAMAGE. BEFORE JUDD, J.

OCTOBER TERM, 1881.

Plaintiff sues for damage caused by defendants falsely swearing that plaintiff was secreting his property, and thus procuring a writ of attachment on all plaintiff's property, which destroyed plaintiff's business and caused him to be put in bankruptcy.

Held, that the validity of the attachment could not be raised in the former suit, for the jury, while trying the question whether Kerr owed Hyman, could not award Kerr damages for a wrongful attachment.

The present suit being, in effect, an action for malicious prosecution, plaintiff must aver malice and want of probable cause: and as the averments of the complaint are not sufficient in this regard, the demurrer is sustained.

Plaintiff, not his assignee in bankruptcy, is the proper person to bring the suit.

DECISION OF JUDD, J., ON DEMURRER.

This is an action to recover damages for injury done to the property of plaintiff, the complaint alleging that the defendants commenced an action on the 1st June, 1881, against the plaintiff to recover the sum of \$1358.77 for goods sold and delivered, and that in their complaint the defendants falsely swore that this plaintiff was secreting his property and disposing thereof or colluding so to do, and thereby procured an attachment on all plaintiff's property; that said attachment destroyed his business and caused another creditor to file a petition against him in bankruptcy; that plaintiff was at that time able to pay his debts, was not secreting his property, or disposing of it dishonestly or improperly or fraudulently, or colluding so to do, which was well known to defendants; and that defendants by their acts intended to injure the plaintiff in his property and business.

To this complaint the defendants demur, stating that the complaint does not allege that (1) the defendant acted without probable cause, (2) and with malice, and, (3) that the former suit is terminated; and also (4) that the former suit raised the validity of the attachment, and (5) that the complaint does not deny the existence of the facts on which the attachment was issued.

At the argument it was further suggested that the assignees, who succeed to the property of the bankrupt, are the proper parties to bring this action.

I am of the opinion that the question of the validity of the attachment, or whether the facts which were brought to the notice of the Judge who allowed the attachment were sufficient to warrant it, could not be tried in the former action. The Code, Sections 1117 and 1120, authorizes the issuing of an attachment by a Judge upon certain sworn allegations in the complaint, and the bond given is to reimburse the defendant for all costs, charges and damages in case the plaintiff shall fail to sustain his action. The sufficiency of those facts is left to the Judge from whom the allowance of the attachment is asked. The jury could not possibly, while trying the issue of whether the then defendant (Kerr) was indebted to the then plaintiffs (Hyman Bros.), try also the distinct question of damage suffered by the defendant in consequence of the attachment. The bond is conditioned on the failure of the plaintiffs to sustain their action, but if the action was not sustained, the jury could not then proceed to assess the damages on the bond in the same action.

This present action is not trespass or other action for damages to property. If it were, the assignees in bankruptcy should bring it.

After a careful reading of the complaint, I find that damages are claimed on account of the alleged *falseness* of the affidavit upon which the attachment was issued; and because the plaintiff, Kerr, was not fraudulently or dishonestly disposing of his goods, which the defendants well knew, which is, in effect, an action claiming damages for a malicious prosecution. The gravamen

of such an action is that the plaintiff has improperly been made the subject of legal process, whether criminal or civil, to his damage. And the plaintiff must aver (as he must prove) (1), that he has been prosecuted either criminally or in a civil suit, and that the prosecution is at an end; (2) That it was instituted maliciously and without probable cause; (3) That he has thereby sustained damage.

I incline to the opinion that the suspension of the civil suit, by the operation of the petition to declare the plaintiff a bankrupt, is a sufficient termination of the suit. The then plaintiffs recover a dividend from the assignees on their claim. Its receipt and the discharge of the bankrupt is a complete bar to the action, and it is virtually at an end.

But the averment of want of probable cause and malice are essential, and I do not think that the averment that the defendants "intended to injure plaintiff," takes the place of an averment of "malice," or the allegation, that "they falsely swore that he was dishonestly disposing of his goods," is equivalent to an averment that there was no probable cause for the prosecution of the complaint.

Demurrer sustained.

B. H. Austin, for plaintiff.

A. S. Hartwell, for defendants.

Honolulu, October 29th, 1881.

KEPOLA *vs.* AHOLI.

MOTION FOR NEW TRIAL. BEFORE JUDD, J.

OCTOBER TERM, 1881.

Alleged newly-discovered evidence being merely cumulative, new trial refused.

DECISION OF JUDD, J.

This is an action of ejectment tried at the July Term of this Court, the jury rendering a verdict for the defendant.

The plaintiff claimed that she was the niece of the original patentee of the land, Keliikuhoe, Pakinikini, plaintiff's mother, being Keliikuhoe's sister.

In order to recover she was required to show this relationship to the satisfaction of the jury, and she had her day in Court to do this.

The motion is now made for a new trial on the ground of newly-discovered evidence, and the affidavit of counsel discloses that after trial some persons, who had heard of the circumstances of the case, declared that they knew the relationship of the plaintiff and could give testimony substantiating it.

It seems to me that when the plaintiff comes to the Court with her complaint, she must be prepared to prove it, and the failure to make diligent search in the locality where the patentee's family lived for sufficient testimony to establish the case, is one that cannot easily be remedied.

The evidence offered is cumulative. I understand the law to be that no new trial will be ordered if the newly-discovered evidence is merely cumulative, and this rule will be relaxed only with great caution.

The new evidence must differ in kind and relate to distinct and independent facts. That offered in this case does not take it out of the general rule of law.

New trial refused.

Castle & Hatch, for plaintiff.

J. L. Kaulukou, for defendant.

Honolulu, October 29, 1881.

HING YEE *vs.* CHUNG WA.

ASSUMPSIT. BEFORE JUDD, J.

NOVEMBER, 1881.

Under §820, Civil Code, a Justice of the Supreme Court, who has heard a case in the Intermediary Court, cannot hear the case again in the Supreme Court on appeal without a jury, and the objection cannot be waived by parties.

DECISION OF JUDD, J.

This case, and two others identical in character against the defendant, were tried by me in the Intermediary Court on the 23d June, and judgment rendered for plaintiff in each case for \$45 and costs.

The jury was waived in this Court, and the case, after some further documentary evidence was introduced, was argued and submitted to me for judgment. The law (Sec. 820 of the Civil Code) which forbids a Court or judge from sitting alone on a case on appeal in which he has given a previous judgment, disqualifies me from making a judgment in the Supreme Court, for I do not think such an objection can be waived by parties. The judgment of the Intermediary Court must therefore stand, unless the parties shall choose to take these cases again before another judge of this Court at term.

Castle & Hatch, for plaintiff.

A. S. Hartwell, for defendants.

Honolulu, November 5th, 1881.

LAM CHOCK *et al.* *vs.* CHUN WAH *et al.*

IN EQUITY. BEFORE MCCULLY, J.

DECEMBER, 1881.

Demurrer to bill for dissolution of partnership sustained: 1st. For non-joinder of representatives of deceased partner: 2d. Because the partnership agreement, though annexed to the bill, was not made part thereof.

It appearing that the bill discloses matters of equitable jurisdiction, leave to amend is granted.

DECISION OF MCCULLY, J.

The bill sets forth that the plaintiffs and defendants, together with another person, Chung Luk Hang, now deceased, entered into a co-partnership for mercantile business, on the 18th of November, 1878, at first by oral agreement, afterwards by written articles. The business was carried on till February, 1881. In April following, all the property and effects of the firm were sold under sundry executions, and realized an amount greatly insufficient to satisfy them, and that in consequence the private property of one of the plaintiffs, Lam Chock, has been levied upon to pay the partnership debts. That all the defendants are indebted to the firm in certain amounts both on account of their original subscriptions to capital unpaid, and for goods purchased of the firm which they refuse to pay. The prayer of the bill is for a dissolution of partnership; that a receiver may be appointed, and that the parties be ordered to pay the amounts due the partnership, and also the proportion of remaining liabilities, and for general relief.

Chun Wah, one of the defendants, demurs to the bill.

First. Because of non-joinder of a representative of the deceased partner.

This constitutes a good cause of demurrer. Story, Equity Pleading, §541.

Second. Because the partnership agreement although alleged to be annexed, is not made a part of the complaint.

The authority of *Hoffschlaeger vs. Han Same*, 4 Hawn., 418, is cited, in which case promissory notes on which the action was brought were not recited in full in the body of the complaint, but were annexed, but without a reference as being annexed and made a part of the complaint.

In our case the instrument is said to be annexed, but not prayed to be taken as a part of the complaint. It may be said that being found so annexed, it must be understood that it is intended for a part of the bill and nothing else. Perhaps as much as that might be understood if it were annexed by some fastening, and spoken of as one of the facts of the case. But this would clearly bring it within the rule of the above-cited case. I am of opinion that it is defectively pleaded, and sustain the demurrer thereto.

The remaining objections go more to the substance of the bill, and are non-allegation of the different parties to the judgments on which levy is made and non-profert of them, non-allegation that the plaintiffs have on their part performed all they are required to do; that there is no necessity for a decree of dissolution, it being dissolved by the alleged death of one of the partners; that there is no necessity shown for a receiver, as it is alleged that the firm property is all sold and is insufficient to meet the executions, and no debts are owing except from the partners; that it does not appear that the judgments have been satisfied by the plaintiffs; and finally, that there is non-joinder of the plaintiffs because it is alleged that the goods of only one of them have been attached for the partnership debts.

Looking on the bill as a whole, it presents matters for the jurisdiction of a Court in Equity, and in which there is not a complete and adequate remedy at law. The affairs of an insolvent partnership are to be closed. The plaintiffs ask that the Court may formally pronounce the partnership dissolved, although the death of the partner may have had that effect in law. Such a decree is incident to the whole proceeding, and need not be avoided, and therefore may be asked for.

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They ask for a receiver as among themselves, averring considerable sums due by defendant partners to the partnership, and exhibiting a state of facts requiring the intervention of some indifferent party. And they ask the aid of the Court in apportioning their liability and in closing finally the transaction.

There being these matters of equitable jurisdiction in the bill, it will not be dismissed, but may be amended pursuant to our rules.

Castle & Hatch, for plaintiffs.

Hartwell (*Whiting* with him), for defendant.

December 8th, 1881.

DECISION OF McCULLY, J., ON SECOND DEMURRER.

The bill has now been amended—

1. In alleging that the partner deceased left no widow, issue, or other legal representatives, and no property whatever within the jurisdiction of this Court. Upon this allegation it is sufficient to proceed, for there is no interest herein which is unrepresented. Story Equity Pleadings, §78, §91.

2. And by making the partnership agreement a part of the bill.

The bill being thus amended, I am of the opinion expressed in my decision on the first demurrer, that on the whole it presents matters for the consideration of a Court of Equity, and which can be completely remedied in no other Court.

I therefore overrule the second demurrer.

May 22d, 1882.

L. B. KERR *vs.* HYMAN BROTHERS.

DAMAGE. BEFORE McCULLY, J.

JANUARY TERM, 1882.

Where a party has obtained judgment on demurrer on some of his grounds, he is not barred from presenting grounds overruled in the first demurrer, in another demurrer to an amended complaint.

In a suit for damages in the nature of malicious prosecution, the party injured, and not his assignee in bankruptcy, is the proper plaintiff.

The complaint, in an action for malicious prosecution, held to sufficiently traverse the facts which led to the prosecution now claimed to have been malicious.

DECISION OF McCULLY, J., ON DEMURRER.

Upon the first point in demurrer, that this action should be brought by the assignees: This was made in the former demurrer to the former case and was passed upon by Chief Justice Judd, hearing that case. And this is now claimed to make it *res judicata*. That ground was overruled. But upon other grounds the demurrer was sustained. *Cui bono* should the defendant take an appeal when he had obtained his ruling? At the best the Appellate Court could only sustain the ruling of the Court below, and if it pleased to consider only the grounds on which it had already been found good, it might do so and disregard the other which had been overruled, leaving that without final adjudication, or it might reserve the decision as to the points sustained and concur in the previous opinion respecting the overruled point, whereby the party winning below would have lost his case from the necessity of appealing to secure a final decision on a naked principle of law. It seems to me that where a party has obtained his judgment on some of his grounds he does not bar himself from presenting the grounds overruled, though not appealed from, in another demurrer to an amended complaint.

Our statute of bankruptcy, Section 977 of the Civil Code, provides that the assignees shall have full power to sue for and collect debts due to the bankrupt. They may also bring any other suit in their own name, which has for its object the money of any portion of the bankrupt's *estate*.

The plaintiff's action is brought for injuries resulting to him from a suit commenced against him by an attachment, based on an affidavit which is alleged to have been false, by which suit another creditor was induced to throw him into bankruptcy.

The word *debts* is given the broadest latitude in these statutes, including, as in its popular sense, all that is due to a man under any form of obligation or promise; *Lathrop vs. Reed*, 13th Allen; but this would not include contingent debts, executory covenants, guarantees and the like. *Bangs vs. Lincoln* 10 Gray 600. It would include, as in *Hancock vs. Coffyn*, 8 Bing. 358, cited by counsel, claim for the insolvent's property wrongfully distrained, and as against the estate a claim for unliquidated damages resulting from the failure to sell and deliver goods, as in *Lathrop vs. Reed*, cited above, but where the claim was for recovery of damages for conversion of goods in an action of tort for trespass, the damage for the conversion of the goods was separated from the damage of the tort, the former being held to be a claim in bankruptcy which was barred by discharge and the latter was not. *Bickford vs. Barnard*, 8 Allen, 314.

The use of the word "property" in the declaration must not lead us aside from the plain purport of the whole complaint, which does not charge that the goods, chattels or estate of the plaintiff had been taken, diminished or injured, for which his assignees might bring action, but that he has suffered an injury, which may be estimated in damages, by the malicious application of certain civil process. In my view the assignees could not bring this action.

The second point of demurrer is that the declaration does not negative the allegation of the defendant in his attachment suit. The allegation in that suit is that "the defendant is secreting his property and disposing thereof or colluding so to do."

The traversing words are that he "was not secreting his property or any part thereof, or disposing thereof, or any part thereof, dishonestly or improperly or fraudulently or colluding so to do." The three qualifying adverbs, *dishonestly*, *improperly* and *fraudulently*, must be held to belong only to the word *disposing*. The word *disposing* in the statute must be taken in connection with the words *secreting* and *colluding*. These words carry the significance of fraud, and *disposing* in connection with them must intend a fraudulent disposition—secretly and collusively disposing of. A merchant is always disposing of his goods. It was necessary in denying the fraudulent act charged by the words secreting and colluding, to qualify the word disposing as above. This plaintiff purchased goods of this defendant, in order to dispose of them, and he cannot make affidavit that he is not doing what it was his right and business to do, and what the defendant expected him to do.

I hold, therefore, that the traverse made herein is a traverse of the statute allegation taken together, as the defendant made it in the original suit. It is further argued in the demurrer that the defendant having followed the statute form is not liable for damages resulting. This would forbid all suits for malicious abuse of process.

The demurrer is overruled.

Honolulu, January 20th, 1882.

THE KING *vs.* WALTER M. GIBSON.

LIBEL. BEFORE McCULLY, J.

JANUARY TERM, 1882.

Demurrer sustained to indictment for libel, because the indictment fails to charge a malicious publication.

It is libellous to say of a Government official that his conduct is treason to the state.

DECISION OF MCCULLY, J.

The defendant demurs to the indictment for libel:

1. Because the letters are not set forth in the indictment.

The indictment is not based on the letters, but upon what is written and published about the letters, and the charge that certain language cited therefrom, by the Commissioner of Immigration, etc., is treason to the state.

It is not requisite, in my opinion, that the letters be set forth.

2. Because the alleged libellous words are not libellous in law.

Taken with what is set forth in the libel, the words: "This is treason to the state by a so-called Minister of State" may not charge the statute crime of treason, P. C. VI., §1. Treason is hereby defined to be any plotting or attempt to dethrone or destroy the King, or the levying of war against the King's Government, etc. Sec. 5: To constitute the levying of war contemplated in the first section, it shall be requisite that the persons concerned therein be parties to some overt act in or towards procuring or preparing force, etc.

Writing letters limiting immigration or discouraging general immigration, may not be brought within the definition of an act of treason as above, and so the words which form the charge of libel herein may not be considered as imputing such indictable offense.

The word "treason" has, however, a secondary and non-technical use. Traitor, betrayer, treachery and treacherous are similar words. They are all used to import failure, neglect or violation of duties, obligations, trusts and interests by private persons of private duties, and by official and public persons of official duties.

To say of an official that his conduct is treason to the state must be held to tend to bring him into disgrace, abhorrence, odium, hatred, contempt or ridicule, which is defined by our statute to be libel.

3. Because it is not charged that there was a malicious publication.

Section 3, of Ch. 32, Penal Code, being our statute of libel, defines publishing a libel to be the maliciously putting of it into circulation.

Section 4 enacts that malice is shown in respect to libel by making a publication, or communicating it to others wilfully and purposely to the prejudice and injury of another. Hatred or illwill toward the party injured is not essential to libel.

There must be legal malice in the publication.

The law presumes that one who publishes of another that which is defamatory on its face, does so with the malicious intent which constitutes libel. Archb. Cr. Pleading, 1036. "If the publication is libellous, malice is presumed from the injurious act." *Com. vs. Bonner*, 9 Met., 412; also, *Smart vs. Blanchard*, 42 N. H., 137; *Com. vs. Snelling*, 15 Pickering, 337. All authorities concur in this doctrine of the legal presumption of malice.

Our statute of criminal practice, 1876, Ch. XL., Section 15 provides, that no indictment for any offense shall be held insufficient for the want of any matter unnecessary to be proved. Neither is it necessary by the established rules to aver matters which would more properly come from the other side, or which are implied by the fact and circumstances alleged or which the law will presume.

I do not understand by this statute provision and by these rules of pleading, that a substantive averment which is or may be established by legal presumption, following upon proof of other facts, and as the result of such proof, need not therefore be made in the indictment, but that it relates to the mode or necessity of proof thereof.

Section 5 of our libel statute provides, that in every prosecution for writing or publishing a libel, the defendant may give in evidence in his defense upon the trial, the truth of the matter contained in the publication charged to be libellous. Provided, however, that such evidence shall not be deemed a justification, unless it shall be further made to appear on the trial that the matter was published with good motives and for justifiable ends.

This is the defense, the words being defamatory or libellous and having been published, first against the making of the libel, that it is true, and second against the publishing, that it is true or published with good motives and for justifiable ends, that is to say, not with legal malice.

The burden of proof is on the defendant. As to publication—which is all that is charged in this indictment—he must show that it was not malicious. Per Shaw, C.J., in *Com. vs. Bonner*, as above, after citing the Mass. statute which is in the same words with our Section 5th.

But it not having been so averred in the indictment, his proofs of good motives, justifiable ends or privilege to maintain against the presumption that the publication was not malicious, would traverse no averment.

A presumption of law dispenses with direct proof of the thing presumed from certain facts, and that is all. It must be averred equally when it is presumed from the proof of other facts as when required to be proved as a separate fact.

Criminal intent is legally presumed from criminal acts, but it is a universal rule to charge intent as well as the acts done, and it would not be sufficient to charge the acts without charging the intent also. Lord Ellenborough, C.J., in *The King vs. Philipp*, says: "It may be said, however, that the criminal intent was necessarily implied from the publication, and therefore that any averment thereof was superfluous" * * * but, citing cases, he says such indictments were not maintainable. * * "If any particular bad intention accompanying the act be necessary to constitute it a crime, such intention should be laid in the indictment. In many cases the allegation of intent is a merely formal one, being no more than the result and inference which the law draws from the act itself, and which, therefore, requires no proof but what the act itself supplies; as in the case of libels when the fact of publication is in question."

In an indictment upon statutes where the definition of the offense contained in them includes such adverbs as "unlawfully, wickedly, maliciously," etc., the offense must be charged

to have been so committed, otherwise the pleading will be bad. 1 Archb. Crim. Pleading, 300.

When an act must be done with a particular intent in order to render it criminal, an evil intention must be averred upon the record. 1 Archbold, under the subject of technical words, 303.

So the want of a direct allegation of anything material in the description of the substance, nature or manner of the offense cannot be supplied by any intendment or implication whatsoever, and therefore in an indictment for murder the omission of the words of "malice aforethought" "is not supplied by the words feloniously murdered," although the latter words imply them. 1 Archbold, p. 290. The illegality of the publication must be averred by means of the word, maliciously, or some equivalent term. Heard's Libel and Slander, with authorities, p. 382.

The intent is legally proved, that is, presumed, by proofs of certain acts, and then the burden of proof lies on the defendant to controvert the averment so supported by presumption of law.

In this respect the statute of libel is most explicit, the defendant may traverse the charge of maliciously publishing which has been presumptively established, by proofs of justification, but he must first be so charged.

The precedents of indictments as they are compiled in Train and Heard's Precedents of Indictments, p. 356, *et seq.*, all set out a malicious publishing—"wickedly and maliciously did write and publish, and cause and procure to be written and published, a certain false, wicked, malicious and scandalous libel of and concerning," etc., p. 366.

The averment that the matter is malicious is not sufficient without the averment that the publication is malicious.

Publication without legal malice is not an offense, and the defendant is not therefore charged herein with the statute crime of libel. On this ground the demurrer is sustained.

A. S. Hartwell, for the prosecution.

Ed. Preston & J. Russell, for defendant.

H. N. GREENWELL *vs.* J. D. PARIS *et al.*

IN EQUITY. BEFORE JUDD, C.J.

FEBRUARY, 1882.

The Court declines to set aside certificate of a Commissioner of Boundaries and Royal Patents issued thereon: it appearing that plaintiff had sufficient notice of the proceedings before the Commissioner and acquiesced in the line found by him: and that a Royal Patent was issued upon said certificate, merely to give the metes and bounds, there being a former Patent for the same land by which the title passed.

DECISION OF JUDD, C.J.

This is a bill in equity to set aside the certificates of boundaries of the lands of Kealakekua and Kaawaloa, in South Kona, Hawaii, and the Royal Patents issued in pursuance of these certificates. The bill alleges that these lands were awarded by the Land Commission (Award Number 8452) to one Keohokalole; that in pursuance of this Award a Royal Patent was issued for Kealakekua, dated 12 January, 1858, and numbered 3607: that thereafter both these lands became the property of J. D. Paris, Sr.: that in 1873 Mr. Paris applied to Rufus A. Lyman, then Commissioner of Boundaries for Hawaii, to have the boundaries of these lands certified; that in 1876, the Commissioner certified the boundaries of these lands, but without certifying the line between them; that J. D. Paris conveyed the land of Kealakekua to his son, J. D. Paris, Jr.; that on the 24th May, 1880, J. D. Paris, Jr., agreed to sell the land of Kealakekua to the complainant, and executed a conveyance therefor, in December, 1880; that on the 1st of October, 1880, J. D. Paris, Jr., pointed out to the complainant and to D. H. Hitchcock, a surveyor, the alleged boundary line between Kealakekua and Kaawaloa; that this boundary line is not true and correct, but deprives the complainant of about 500 acres of his land of Kealakekua; that in April, 1881, the defendants, or one of them, applied to Hon. F.

S. Lyman, the present Boundary Commissioner, to have the boundary line between these two lands certified: that it was not disclosed to the Commissioner that the complainant was the owner of Kealakekua, and the Commissioner, by certificates dated April 18th, 1881, certified the boundary line between the lands as pointed out by J. D. Paris, Jr.; that in making such certificates the Commissioner professed to act under the application of 1873, and did not notify the complainant of such hearing, and he was not represented; that in June, 1881, application was made for Royal Patents for those lands, and the Minister of Interior issued them according to the boundaries certified on the 18th April, 1881, the Patent for Kealakekua being numbered 7533, and that for Kaawaloa being numbered 7532; that by the granting of those certificates and Patents the complainant is injured, etc.; and the bill charges that the certificates and Patents are, under the circumstances, void and of no effect, as against this complainant, and should be so adjudged, etc.

The answer admits the allegations in the bill as far as the allegation that the boundary line as pointed out by J. D. Paris, Jr., to complainant between the lands of Kealakekua and Kaawaloa is not the true line between them, and alleges that it was a part of the agreement of May, 1880, that J. D. Paris, Jr., should obtain a Patent for Kealakekua by metes and bounds at his own expense, and that the line pointed out to complainant was accepted and agreed to by him as the correct boundary to be certified by the Commissioner of Boundaries. The answer also admits the making of the application to Hon. F. S. Lyman to certify the boundaries between the two lands, but denies that the fact of the sale of Kealakekua to the complainant was not disclosed to the Commissioner: and the answer admits that the Commissioner professed to act under the petition of 1873, and that the Commissioner did not notify complainant, but denies that complainant had no notice of the application. The answer also admits the issuing of the certificates and Royal Patents in pursuance, and denies the injury to complainant, and that the certificates and Royal Patents are void and should be so ad-

judged. The answer further alleges that the conveyance to complainant is a quit claim of Kealakekua as described in Royal Patent No. 3607, but that this Patent does not set forth the boundaries of the land, and the Patent No. 7533 was obtained for Kealakekua by request of complainant, and it was by the knowledge and consent of complainant and pursuant to his agreement that the boundary line therein was made known to the Commissioner, and that as a part of the consideration of the agreement a portion of the land of Kaawaloa was included in the Royal Patent for Kealakekua. And that the complainant is estopped from denying the correctness of the boundary line or the validity of the Royal Patent 7533.

A hearing was had on the 30th January, 1882. Without detailing the evidence, I have come to the following conclusions of fact and law:

In 1873 Rev. J. D. Paris owned both the lands of Kealakekua and Kaawaloa, which adjoin each other and run from the sea to the mountain. He applied for a certificate and one was made establishing their boundaries as one land; not running the dividing line. On the 17th October, 1874, Mr. Paris, Sr., conveyed Kealakekua to his son, J. D. Paris, Jr., who made the following agreement with the complainant:

"I the undersigned, J. D. Paris, Jr., do hereby sell to H. N. Greenwell, the Ahupuaa of Kealakekua, South Kona, Hawaii, with all the improvements thereon, and 400 head of cattle, for the sum of twelve thousand dollars, and on receipt of the said \$12,000, do hereby bind myself to give unto the said H. N. Greenwell a quit-claim deed free of incumbrances, of the said land of Kealakekua, with Royal Patent for same, etc., etc., etc.

J. D. PARIS, JR."

Kealakekua, Hawaii, May 24th, 1880.

A Royal Patent had been issued for the land of Kealakekua. It is dated 12th January, 1858, and numbered 3607, and grants the "Ahupuaa of Kealakekua" to Keohokalole, but giving no description by metes and bounds. This patent is evidence that the Government right to commutation therein is extinguished.

I see no reason why a second patent for the same land, granting it by metes and bounds, in pursuance of a certificate of the proper Boundary Commissioner, cannot legally be issued. The object of the boundary commissioner is to enable parties to obtain such Royal Patents defining their lands by metes and bounds, and, whether they hold by the Award of the Land Commissioner, deed of the King or Royal Patent, the Boundary Commissioner has jurisdiction if the title was granted without defining the boundaries of the lands.

I am satisfied that what the purchaser (Mr. Greenwell) desired was a Royal Patent by metes and bounds, and that is what is mentioned in the agreement of 26th May, 1880. He says he wished a "survey so as to know what he was buying." His attorney accepted on the 27th December, 1880, a quit claim deed for the land on the Patent No. 3607 without metes and bounds, under a promise that the Royal Patent by metes and bounds should be forthcoming. Both the respondents testify in substance that complainant required a Royal Patent to be furnished by Mr. Paris, Jr., defining the metes and bounds before he could consider the agreement for a Royal Patent complied with. The delay on the part of complainant to make payment from May 24th to December 27th, cannot be explained, to my mind, unless he was in fact waiting for the Royal Patent by metes and bounds, for he was aware of the existence of the Royal Patent for Kealakekua granting it by name and without defining the boundaries, and could have had a deed upon this patent immediately.

I understand, however, that the complainant testifies that he wished merely a survey. An *ex parte* survey would not be an authoritative confirmation of the boundaries of the land purchased, and he certainly led the respondents to believe that he required a Royal Patent by metes and bounds.

His action in meeting the surveyor and Mr. Paris, Jr., on the land, his seeing the surveyor run the dividing line between them, making suggestions where it should be and consenting to it, leads to this conclusion. It has also the effect of committing

him to the boundary line as run. The surveyor, the respondents, and, as I think, the commissioner, knowing that the complainant as an intending purchaser had consented to this line, it would have been idle to have given him formal notice of the hearing before the commissioner.

Remembering the bargain between them for a Royal Patent by metes and bounds at Paris, Jr.'s, expense, and his acquiescence in the line as run by the surveyor, he should have inferred that this survey would be presented seasonably to the commissioner for adjudication. If he had grounds for objecting to the line, he had an opportunity of presenting them to the commissioner or the respondents.

I remark here that no evidence was offered to show that the line decided by the commissioner defining the division of these two lands is untrue, and this would be sufficient ground for declining to declare the patents void. The complainant's counsel have, however, asked that the Court order the commissioner to re-open the matter and take fresh evidence. I think he is too late for this.

I do not consider it necessary to go into the question whether it was competent for the commissioner to make a second adjudication upon the original petition of Mr. Paris. At the time of this matter being presented to the commissioner the title of both lands was still in the respondents. The fact that the deed for Kealakekua passed before the date when the commissioner signed the certificates, is not important, considering the complainant's acquiescence, and his silence, in not notifying the commissioner that he had bought the land and objected to the survey, estops him from objecting to it now. His consent to the line recited in the second Royal Patent for Kealakekua estops him from disputing the regularity of the proceeding before the Boundary Commissioner, upon which it is based.

Bill dismissed.

E. Preston, for complainant.

A. S. Hartwell, for respondents.

Honolulu, February 28th, 1882.

MINISTER OF FINANCE *vs.* V. KNUDSEN *et al.*

DELINQUENT TAXES. BEFORE JUDD, C.J.

APRIL, 1882.

A proceeding for collection of delinquent taxes is *in rem*, and also *in personam*: where the owner of real estate is known and judgment is asked against him, it is *in personam*, and the owner must be served with process or a judgment against him will not be good.

In such a proceeding, an averment of demand for payment of taxes is fundamental.

DECISION OF JUDD, C.J.

This is a petition by the Minister of Finance, certifying a report of the Governor of Kauai, by which it appears that the taxes on the Ahupuaa of Koloa, Kauai, have not been paid, and asking for judgment against the delinquent property and V. Knudsen and Mrs. Anna McH. Knudsen. A special appearance is made by Mr. V. Knudsen, who shows the Court (1.) it does not appear that the petition contains an averment that the collector of taxes called on the said V. Knudsen or otherwise gave notice to him to demand payment of said tax; (2.) that the report of the collector does not show or aver that the Ahupuaa of Koloa was, or is, the property of Mrs. Knudsen, nor does it set forth or show the ownership or names of the owner of the land; and, (3.) that the petition contains no prayer for process, or summons against the said V. Knudsen or Anna McH. Knudsen.

The counsel for the Minister of Finance contends that this is a proceeding *in rem*, and therefore it is not necessary to bring the alleged owner of the property within the jurisdiction of the Court by summons, and so none was prayed for.

In my opinion a proceeding of this character is *in rem* and also *in personam*. Especially where the owners of delinquent real estate are known, as in this case, and where judgment is prayed for, not only against the land, but against Mr. and Mrs.

Knudsen, is it a proceeding *in personam*, and, therefore, a prayer for process against them is essential. The words of the 507th section of the Civil Code, which say that "if no sufficient reason appear to the contrary, judgment shall be entered," etc., bear this view out, for this implies that an opportunity is to be given to show sufficient reason why judgment should not be entered.

Enough appears on the face of the petition to show that the owners of the delinquent property are known to the petitioner, and when the owners are known and judgment is prayed for against them, they must be served with process or a judgment against them would not be good.

It is replied to the first point—that no demand by the collector for payment of taxes is shown—that the averment that Mr. Knudsen's agent paid all the other taxes assessed against him and disputed that on the land of Koloa and appealed to the Board of Tax Appeals, which board confirmed the assessment, implies a prior demand for payment of taxes.

In proceedings of this nature the statute must be strictly complied with, and nothing can be taken by way of intendment. I consider an averment of demand for payment of taxes as fundamental.

As to the third point—the non-averment of ownership—the report of the collector shows that the Ahupuaa of Koloa was assessed to Mr. V. Knudsen, which is all the law requires.

It is urged by the petitioner's counsel that this appearance is premature, and that the appearer should wait until the land is sold and then test the validity of the proceedings by a suit of ejectment or trespass against the purchaser. He may do so; but as he has chosen the other course and suggests sufficient reasons why a judgment should not be entered as prayed for, I feel constrained to rule that a judgment cannot be entered on the petition in its present shape.

E. Preston, for petitioner.

A. S. Hartwell, for the appearer.

Honolulu, April 14th, 1882.

S. T. ALEXANDER & H. P. BALDWIN *vs.* A.
FORNANDER, Tax Collector.

ASSUMPSIT. BEFORE MCCULLY, J.

MAY, 1882.

On the question of over-valuation by a tax-assessor, a failure to appeal to the Tax Appeal Board leaves the assessment fixed; and the tax-payer cannot obtain a reduction by an action at law.

To tax an irrigation ditch and also the water flowing through it, is double taxation.

DECISION OF MCCULLY, J.

The plaintiffs claim herein from the tax-collector of Maui, \$316.05, paid under protest on \$42,140 assessment, illegally, falsely and doubly assessed.

Excess of assessment is claimed on two items.

1st. Because a certain acreage of kula, or dry and pasture land has been appraised at \$10 per acre, whereas it is not worth more than \$5.50 per acre, at which value it was returned.

2d. Because an area of land on which sugarcane is grown by the aid of water from "The Haiku Ditch," owned by a Ditch Company, of which plaintiffs are members, is taxed upon the footing of land to which water is appurtenant, while the ditch is separately assessed and taxed, so that there is said to be double taxation. It is first to be considered if the Court has jurisdiction in these items, or either of them.

In *Castle vs. Luce*, 4 Haw., 65, the Court entertained the case of a complaint that the plaintiffs, being shareholders in the Haiku plantation, were taxed on the market value of the shares, while the plantation and its material had paid taxes *in solido* upon all the value represented by the stock. The Court say: "for any defect or irregularity in assessing the taxes, or excess in valuation, the party must appeal to the Appeal Board."

This was claimed by counsel to be *obiter dictum*. It is stated without reasoning or citation of authorities; but without con-

sidering it *obiter*, the matter may be now examined. In *Bowne vs. City of Boston*, it is held (Bigelow, J.) that the principle is now well settled by the authorities that the sole remedy for over taxation, caused by an excessive valuation of property, or by including in the assessment property of which the person is not the owner, or for which he is not liable to taxation, is by an application to the assessor for an abatement, and there is no remedy by an action at law. This agrees with *Howe vs. Boston*, 7 Cush., 273; *Lincoln vs. Worcester*, 8 Cush., 55.

Judge Cooley, p. 528, of *Cooley on Taxation*, states the law to be that for a merely excessive or unequal assessment, where no principle of law is violated in making it, and the complaint is of an error of judgment only, the sole remedy is an application for an abatement, either to the assessor or to such statutory board as has been provided for hearing it.

Upon examining the Massachusetts Statute, I find no express provision that there shall be no other remedy, and in this respect our own is the same. Section 9, of the Act of 1860, constituting Tax Appeal Boards, provides that the tax-collector may grant any person disputing the amount of his assessment a certificate of appeal to the Tax Appeal Board of the district. There is no express provision for application to the assessor to abate, but as the determination of the value is a matter of the assessor's judgment, any consideration affecting it may be urged on the assessor before he has closed his roll. There is then an appeal to a board of three other persons, who being of the same district, the Police or District Judge being one, and two who are appointed as knowing the values of property, determine if there has been an over-valuation.

It is conceded by plaintiffs' counsel that there can be no appeal from this board to the Supreme Court, but it is claimed that the provision that the Supreme Court shall have jurisdiction of all cases in law or equity, whether the same be brought before it by original writ, by appeal or otherwise, Civil Code Section 829, and Const. Art. 67, permits the plaintiffs to bring any controversy with a tax-assessor and collector as an action of

law before the Supreme Court. But by the same reasoning an appeal could be taken to this Court from the Tax Appeal Board, there being no exclusive words in the statute; which, correctly, the counsel admits cannot be taken.

On reason and authority other than the opinion expressed in *Castle vs. Luce*, 4 Haw., 63; and *Widemann vs. Minister of Finance*, 3 Haw., 789; it is clear that this Court cannot consider the question of over-assessment based on the assessor's judgment of value, and that a failure to appeal to the Tax Board leaves the assessment fixed. So much, therefore, of the plaintiffs' claim as is based on the alleged over-valuation of the Kula or pasture land is disallowed.

The defendants are shareholders in the Hamakua Ditch Company, the tax on which was the subject of litigation in *Haiku Sugar Company vs. Birch*, 4 Haw., 275, wherein it was held that this was separate property, to be assessed by itself, and not appurtenant to the land of the shareholders. The Ditch Company has been assessed for its property and paid the tax. The defendants use the share of water of the ditch to which their proportional ownership entitles them, being one-fourth upon certain portions of their land. It is not sufficient to irrigate all their land. Mr. Baldwin's testimony is that not to exceed 325 acres may be irrigated out of 940 acres, which are capable of growing cane if irrigated, but which are practically not cane land without means of irrigation. Their share of the ditch water may be applied to such portion of the territory in any year, as they choose, whereby that becomes cane land. The assessor's book shows the following appraisements: 940 acres of sugar land, being 400 acres that is or can be irrigated, at \$125 per acre, and 540 acres not irrigated at \$30 per acre. For the water which makes any portion irrigated land the plaintiffs have paid one-fourth of the assessment laid on the ditch.

It is contended in argument that the ditch being valued merely at the cost of making it, and of the material used for pipes, aqueducts and flumes, the value of the water has not been

included and taxed. There are two elements of appraisement, one the cost, the other the utilitarian value. A ditch might be made which should be handsomely cut, with architectural spans across valleys, and with ornamental masonry, but which not leading to a full and constant supply of water, would be of little or even of no useful value. The great outlay of construction would have been wasted. On the other hand, a copious stream of water may be led at insignificant expense to where it will produce a great profit. Evidently the cost of procuring the irrigation is not the criterion of the utilitarian value of the water course. But as a ditch is a work for utility, the "cash value" of it, which the law regards, must come to be what it is worth rather than what it cost. If the Hamakua Ditch failed to bring water to the value of \$93,000, it would not sell for this amount, the cost of making it. And it will sell for an amount proportionate to its water, that is, its utility in excess of the cost. Substantially, then, the value of the water must be taken to be the value of the ditch, for there is nothing of considerable value that can be moved from its site. A great part of the cost of such a ditch is in excavation and earth work. The pipes and flumes, though costly to place, cannot be converted into equivalent values when broken up and removed.

If this reasoning is just, it is double taxation to assess the ditch and likewise the distributive shares of the water thereof. The assessor has fixed the value of the ditch at what it cost to make it, and which may be more or less than its cash value. He has also charged the plaintiffs with the value of one-fourth of the water by the amount of the enhancement of 400 irrigable acres from \$30 to \$125 per acre, which is \$38,000, on which the tax is \$285.

To this extent I hold that it is duplicate taxation. The case of *Castle vs. Luce* proceeds upon the principle that duplicate taxation will not be sustained when the statute does not clearly impose it. The presumption is against duplicate taxation. Says Judge Cooley, p. 165 of his *Treatise on Taxation*: "It has very properly and justly been held that a construction of the

laws was not to be adopted that would subject the same property to be twice charged for the same tax, unless it was required by the express words of the statute, or by necessary implication." (With authorities.)

Some testimony was given to the effect that some of the land under cultivation had cost to clear off the cactus and other thicket, a considerable sum in excess of its valuation as possible cane land when watered.

But the facts as to cost and as to the area are not presented with sufficient exactness for determining the effect in this assessment. The Court can only proceed upon the assessment as above cited from the assessor's book; and applying the foregoing principles thereto, I find for the plaintiff in the sum of \$285.

Let judgment be entered accordingly.

W. R. Castle, for plaintiffs.

Attorney-General Armstrong, for defendants.

Honolulu, May 5th, 1882.

KAPOHAKU *et al. vs.* KOA.

MOTION FOR NEW TRIAL. BEFORE JUDD, C.J.

MAY, 1882.

While the jury were deliberating, one of the jurors leaned out of the open window of the jury-room and spoke to a police officer who was guarding the building:

Held, not such misconduct as to demand a new trial: it not appearing that the conversation had any bearing on the case.

DECISION OF JUDD, C.J.

It appears by the affidavits filed, that while the jury were in their room deliberating upon their verdict, one of them, Sam. C. Dwight by name, leaned out of an open window and had a conversation with a police officer, Kaainiu, who, though not

pecially sworn to take charge of the jury, had been stationed by the Marshal in the yard to keep off intruders from the jury. It further appears that Dwight told the officer that the jury were obstinate; also that the officer should move away from the building, and that he desired him to open the door so he could go out for a necessary purpose. It does not appear by the affidavits that the officer said anything, except to tell the juror to leave the window.

The affidavit of the juror is objected to as inadmissible under the ruling in *The King vs. Kahalewai*, 3 Hawn., 465; the Court there held that affidavits of persons who overheard the discussions of the jurors in the juryroom cannot be shown to invalidate their verdict, nor could affidavits of the jurors themselves, disclosing their deliberations and proceedings while consulting together, be received.

The misconduct sought to be shown in that case was, that the language used by one juror to his fellows indicated an improper bias against the accused.

In the case before me the sanctity of the juryroom is not sought to be invaded. The affidavits show no conversation among the jurors themselves; if they did, I should be obliged to reject them on the authority of this decision.

The misconduct here alleged is a conversation between a juror and an officer and it consists mainly of remarks by the juror, and only one remark by the officer, to wit, that the juror should withdraw from the window. Should this be held good ground for ordering a new trial?

This Court will endeavor by all means within its power to prevent all attempts to influence the jury, and to preserve the purity of jury trials, and if the conversation described in the affidavits had reference to the case, and was likely or calculated to influence the verdict, I should be bound to set aside the verdict, even though it be not proved that such influence was exerted.

In the instance before me the officer should not have approached the window nor listened to the juror's remarks, but he

should have moved away and reported to his superior or the Court; but it appearing that he made no reply, except to warn the juror away from the window, I cannot say that this is misconduct which vitiates the verdict, as he said nothing having any bearing on the case.

I have examined the cases cited in support of the motion, and while adhering to the principles there laid down, it seems to me that the facts of the case before me do not show such misconduct as would vitiate the verdict. To sustain the position of counsel for the motion, that any conversation or remark addressed by a juror to an officer, should entitle the verdict to be set aside, without inquiry into the nature of that conversation, or whether it was calculated to affect the verdict, would be extremely embarrassing to the Court. The Court should exercise a discriminating view and decide each case upon its merits.

The authorities cited are Proffatt on Jury Trials, Section 391; *Sargent vs. Roberts*, 1 Pick., 341, where the judge wrote a letter to the jury respecting the case; new trial granted. *Knight vs. Freeport*, 13 Mass., 217; in this case a new trial was ordered in consequence of a remark by the plaintiff's son-in-law to a juror, after empanelling, that the case was of great importance to him, etc. *Commonwealth vs. Roby*, 12 Pick., 520, where the jury were permitted to have refreshments; *Shea vs. Lawrence*, 1 Allen, 167, where the irregularity complained of was a casual remark by a bystander, made before trial to a third person in presence of one or more jurors, not knowing they were jurors. New trial refused. *Read vs. Cambridge*, 124 Mass., 567; here an officer presiding at a trial before a sheriff's jury, gave fresh instructions to the jury after they had retired, in the absence of the parties or counsel, and a new trial was ordered. *Hamilton vs. Pease*, 38 Conn., 117; verdict set aside because juror conversed with a party about the case, and the conversation showed bias against the unsuccessful party. *Tomlinson vs. Derby*, 41 Conn., 284; in this case the verdict was set aside because a third person told a juror during the trial that if the trial should continue fifteen or

twenty days, and the plaintiff should recover \$5000, he would have nothing left after paying expenses of suit.

Motion overruled.

J. L. Kaulukou, for plaintiff.

C. Brown & A. S. Hartwell, for defendant.

Honolulu, May 11, 1882.

A. F. JUDD & S. B. DOLE, Guardians of Irene Ii *vs.*

KUANALEWA *et al.*

EJECTMENT. BEFORE McCULLY, J.

MAY, 1882.

Defense of adverse possession held not proven.

A right of fishery, appurtenant to an Ili, held to belong to defendants.

DECISION OF McCULLY, J.

The plaintiffs claim possession of a tract of land of 296 acres extent, lying on the border of the Ahupuaa of Waipio, and included in the surveyed boundary thereof and in the Royal Patent held by plaintiffs. They also claim the fishing right to a certain tract of water, a portion of Pearl River, lying contiguous to the premises claimed.

The principal defendant is Kuanalewa (w.), the heir of Manini and Harbottle, who sets up that this parcel of land constitutes the Ili of Hanapouli, and that the fishing rights of the water tract are appurtenant to the said Ili; that this Ili was assigned by Kamehameha I. to Wm. Harbottle, the ancestor of the chief defendant here, Kuanalewa. Harbottle was one of the body of retainers and body guard of the King, known as his Hulumanus.

There is a grant of land designated as the Iliaina of Hanapouli, to Harbottle, twenty chains in extent, a Kuleana lying within the Ahupuaa of Waipio. But the defendants offer testimony to establish that there was a large division or

denomination of land, known from ancient times as Hanapouli, which was what was assigned to their ancestor. It was not taken before the land commission for award, and there is no separate award or patent for it, and it is included within the surveyed and patented lines of Waipio; and they claim that they have held possession of this larger Hanapouli since a time prior to 1853. There are several Kuleanas within the premises in question upon the shore of the bay.

Now, to maintain the defendants' right in the premises against the right of the patentee, there must be a showing of a distinctly adverse, exclusive and hostile possession for twenty years.

The first circumstance to be considered is how it was that Harbottle should not have taken out an award for these premises if they had been assigned him by the King. He did take an award for the small piece called the Iliaina of Hanapouli. The inference is that he secured all that belonged to him. If he had had the same claim to the 239 acres here in question, why should he not have taken an award for it? The award to Wm. Harbottle recites that he claims his Iliaina of Hanapouli which he had received from his father, John Harbottle, who had derived it from Kamehameha I. This was awarded to him, and the description, survey and contents are included in the award as He Loi Koele at Hanapouli, of twenty chains in extent.

The inference that Harbottle did not claim any larger rights than those he received, and that he did not from that time hold adversely any other land than that he applied for and received the award of, is in itself conclusive against the defendants, unless they shall show clearly that there was such adverse holding for the time required by statute.

The defendants' ancestors, in 1856, acquired the title to the Kuleanas of Kaholohana, deceased, one of which is described as an Iliaina of Hanapouli, at Waipio, containing 2 3-10 acres, the other as a purse lot on the back of Hanapouli, containing 27-100 acre. Thus by Kuleana holdings in the midst of the

premises, the defendants had a position on the land, and a right to certain pieces of it, namely, what had been awarded as Kuleanas. The testimony as to their assertion of ownership outside of these pieces, until a recent time, is uncertain and conflicting.

The testimony of Haupū, the first witness for defendants, is to the effect that the houses were on the Kuleanas and the cultivation upon them, except perhaps the portion lately leased by defendants to Chinamen. But he says that defendants at some time cultivated potatoes, calabashes, etc., in the ravine. This may have been outside of the Kuleana limits, but is vague as to the extent and the date. It was in the reign of Kamehameha III., who died in 1854.

Naoō says there were disputes about rights of fishery; says he thinks defendants did not get award for lower Hanapouli because they neglected to go after it. Says there was no cultivation on the lower part when he was at the place. He grew up on this place and was there till 1863.

Kipi, an interested witness for defendants, testifies that Ii's cattle ran over this land because it was not fenced, and gives no distinct testimony of a possession by the defendants.

Holokaua lived at Hanapouli from 1839 to 1852, and has since visited there, owning a small Kuleana in Hanapouli. He gives no evidence of an occupation of this land as is now claimed outside of the Kuleanas.

Keaha says that the defendants occupied the Kula land back to the cliffs.

Kuanalewa, the principal defendant, says that she received tribute of sugarcane and bananas grown on Hanapouli, and not on the Kuleanas.

Kauai, a witness for plaintiffs, testifies that his house was built on these premises in 1865, by permission of Ii, who helped him build it. It still stands, and witness has sold it to Chinamen, lessees holding the land which defendants claim. He says that Harbottle and his wife lived on their Kuleanas, and their cultivation was on their Kuleanas. He says that Ii planted

the land now claimed with corn and water-melons, witness helping him. He says that Kipi, who had made some claims under defendant, worked under Ii after a certain settlement before the District Judge, Kahaleaahu.

Witness was present at the survey of the land for claims. Wm. Harbottle had only a few patches in upper land surveyed. Ii was also present. Harbottle claimed that the King gave him the fishery, and Ii said he would point out his fishery, and sent a man who waded in the water along the line of it. This testimony I shall refer to when discussing the fishery rights.

This witness says that he used the beach of these premises as a landing when fishing outside for Ii. That he has not known of any one cultivating this land adversely to Ii till the Chinamen recently. All the cultivation was under Ii. The stock on the land belonged to Ii and to natives who did Poalima work for him. Witness had planted cane on this land on shares with Ii.

Upon the whole testimony relating to the dry land, I find for the plaintiffs, the holders of the title. The defendants' testimony does not support such an adverse possession as, upon the principles now frequently enunciated in this Court, establish a prescriptive right in the defendant.

2. In regard to the fishing rights, the testimony of the plaintiffs' witnesses as well as the defendants', shows that Harbottle had some rights in a fishery appurtenant to his grant, and greater than those of common Kuleana-holders and tenants of the Konohiki. I have above cited a passage of testimony showing that this right was conceded by John Ii, the holder of the Ahupuaa of Waipio. This right may be supposed to have arisen from the fact that the claim and award to Harbottle was for an Ili Aina, as distinguished from a mere Kuleana, or a lot which the claimant had occupied or cultivated. The assignment by the King of an Ili Aina carried with it appurtenant rights, not subservient to the Konohiki of the Ahupuaa. Kamai, a witness for plaintiffs, says the fishery was a lele of Hanapouli.

There is some conflict of testimony as to the extent of the water premises, although all agree that it was not a deep water fishery. A man could wade along the outer boundary. The original survey and plot made by Rev. A. Bishop, who surveyed this branch of Pearl River, as the Kai or water appurtenant to Waipio for Ioane Ii, is before me. It bears a note by the Secretary of the Land Commission, J. L. Nailili, dated March 28th, 1855, to the effect that the Land Commission declines to award the water rights by metes and bounds, leaving them to be determined by the general law. On this map is a line drawn from a point near Loko Eo, and running to a point near Laehopu, where it intersects the line which divides the Kai of Waipio from the Kai of Waiawa, and in Mr. Bishop's handwriting the words Kai o Hanapouli.

The testimony is that Mr. Ii and Harbottle were on the ground with Mr. Bishop; that there was a discussion as to the fishery belonging to Harbottle, and that Ii pointed out a line running as this designates, which was apparently accepted by Harbottle, and the survey made accordingly. This is the most definite determination which the testimony allows, and I therefore find for the defendants the right of fishing within these limits. The point of beginning is termed Nenehopu Halaulani, and is described as two chains from the makaha of Eo, and runs to the point outside of Laehopu as designated on Mr. Bishop's plot.

I give nominal damages to the plaintiffs of \$5, costs to be divided.

S. B. Dole, for the plaintiffs.

F. M. Hatch, for the defendants.

Honolulu, May 17th, 1882.

A. HATTON *vs.* PIOPIO.

AT CHAMBERS. BEFORE JUDD, C.J., ON APPEAL FROM DISTRICT
JUDGE OF EWA.

JUNE, 1882.

Under our fishery laws every resident on a land has the right to fish in the sea appurtenant to the land and to sell the fish caught by him.

DECISION OF JUDD, C.J.

The case comes up on appeal from the District Court of Ewa on the following agreed statement of facts:

This case was brought by plaintiff for an illegal trespass of Piopio in fishing, and taking and selling fish caught in the fishery belonging to the Ahupuaa of Honouliuli, Ewa, Oahu, Piopio being a resident of Puuloa and a tenant of James I. Dowsett, under whom he (Piopio) justifies; James I. Dowsett being the owner of Puuloa, a portion of the Ahupuaa of Honouliuli, and as such owner entitled to the right of piscary, as appears by *Haalelea vs. Montgomery*, 2 Haw., 62.

1. It is hereby admitted that James Campbell is the owner of the Ahupuaa of Honouliuli.

2. That he has leased to the plaintiff his (the Konohiki's) right to take fish from Kalaeloa, or Barber's Point, to Puuloa wharf.

3. That Dowsett, under whom Piopio justifies, is the owner of Puuloa.

4. That Puuloa is the lower portion, or a part of the Ahupuaa of Honouliuli.

5. That Piopio is a resident of Puuloa, but not in his own right, owning no Kuleana, but a tenant servant of J. I. Dowsett.

6. That the value of the fish taken and sold by Piopio was \$34.00, and that the proceeds (\$34.00) have been delivered to Dowsett.

7. That the fish were caught in the sea fronting Puuloa.

It is also admitted that Piopio (defendant) was born on the Ahupuaa of Honouliuli, and has always lived there. The plaintiff contends that (1) Piopio is not a tenant (hoa-aina) within the statute; and that (2) though Dowsett as the owner of Puuloa may have the right to take fish in the sea adjoining his land, he cannot delegate this right to defendant; and that (3) though the tenant may fish for his own consumption, he cannot sell the fish taken by him.

The law regulating fisheries of these islands, pertaining to this case, is found in the following sections of the Civil Code:

Section 387: "The fishing grounds from the reefs, and where there happen to be no reefs, from the distance of one geographical mile seaward to the beach at low water mark, shall, in law, be considered the private property of the Konohikis, whose lands by ancient regulation belong to the same, in the possession of which private fisheries the said Konohikis shall not be molested, except to the extent of the reservations and prohibitions hereinafter set forth."

Section 388: "The Konohikis shall be considered in law to hold said private fisheries for the equal use of themselves, and of the tenants on their respective lands; and the tenants shall be at liberty to use the fisheries of their Konohikis subject to the restriction imposed by law."

Section 389: "The Konohikis shall have power each year to set apart for themselves one given species or variety of fish natural to their respective fisheries, giving public notice by *viva voce* proclamation, and by at least three written or printed notices posted in conspicuous places on the land to their tenants and others residing on their lands, signifying the kind and description of fish which they have chosen to be set apart for themselves."

I am of the opinion that any *bona fide* resident upon the land is a "tenant" within the terms of the statute. Such was the opinion of this Court in *Haalelea vs. Montgomery*, 2 Haw., 62 (1858).

Says the Court, per Robertson, J.: "We understand the word tenant, as used in this connection, to have lost its ancient restricted meaning and to be almost synonymous, at the present time, with the word occupant or occupier, and that every person occupying lawfully any part of Honouliuli, is a tenant within the meaning of the law."

"Those persons who formerly lived as tenants under the Konohikis, but who have acquired fee simple titles to their Kuleanas, under the operation of the Land Commission, continue to enjoy the same rights of piscary that they had as hoaaínas under the old system."

Every resident on the land, whether he be an old hoaaína, a holder of a Kuleana title, or a resident by leasehold or any other lawful tenure, has a right to fish in the sea appurtenant to the land as an incident of his tenancy. The case above referred to clearly decides that the owner of Puuloa has a right of piscary in the sea of Puuloa, as a tenant of Honouliuli. I cannot justify the fishing of the defendant or any person not a *bona fide* tenant of the land, by the mere permission of Dowsett, for Dowsett has no greater rights than any other tenant of Honouliuli. He has no Konohiki rights in the sea of Puuloa. These remain to the owner of the Ahupuaa of Honouliuli. This was so decided in the above cited case. But as Piopio is conceded to be an old resident or hoaaína of Honouliuli, and living permanently at Puuloa, he has the undoubted right to fish in the sea of Honouliuli of which the sea of Puuloa is a part, as an incident to his tenancy. It is his domicile on Puuloa as a part of Honouliuli that gives him the right to fish, and not by a delegation of Dowsett's rights.

I come now to the question of the right of the tenant to sell the fish so taken by him. It is noticeable that in Section 1477 of the Civil Code, where certain specific rights of the people are secured, the people on the lands are allowed to take firewood, house timber, aho cord, thatch and ki leaf from the land on which they live, "for their own private use, but they shall not have a right to take such articles to sell for profit."

No such restrictions are made in the statute respecting the fisheries. The words granting the right are, "the tenants shall be at liberty to use the fisheries of their Konohikis, subject to the restrictions imposed by law." What is the nature of that "use of the fisheries," which the tenant may enjoy? Is it the right to take fish for his own consumption merely?

The argument is made that, as in ancient times no fish was accustomed to be sold, and as the tenant has no greater rights now than he had then, he cannot now sell fish. But in the primitive days of this country there was no trade or commerce and no currency. The business of the country was a system of exchange or barter, and at a comparatively recent day taxes were paid in kind. We are not to enquire what was the "use" to which the tenant in ancient times put the fish he caught, but what the words of our statute fairly comprehend. I do not think that the Konohiki is entitled to the fish caught by the tenant in excess of his own needs for consumption. There are no words of the law warranting this view, and it would be oppressive for him thus to appropriate the fruit of another man's skill and labor.

The fishing in the open sea off our coasts does not tend materially to lessen the supply unless extraordinary means are used and the fish taken in spawning season. For fish in the open sea are animals *ferae naturae*, and go and come at will, unrestrained. If the ordinary means are employed in taking fish, the Konohiki's opportunities to take all the fish he is able to capture are not diminished by whatever fishing the tenants may do.

It is unreasonable to hold that the tenant must put the excess of fish beyond what he can eat back into the sea to run off again. The case appears stronger if the Konohiki exercises his option of taking the tabued fish (*ia hoomalu*). These specific fish are set apart for the exclusive use of the Konohiki. His right being thus commuted, he has no exclusive right to other varieties of fish; and if he can sell his reserved fish, the tenants can sell the unreserved fish which they take.

I do not think the law intended to restrict the tenants to the right to take fish solely for their own use.

I am strengthened in this view by Section 392 of the Civil Code, whereby the Konohiki is allowed, on consultation with his tenants, to prohibit during certain months in the year all fishing upon their fisheries, and during the season to exact one-third of the fish taken by the tenants as his share. Here, certainly, the Konohiki cannot take more than his one-third.

Judgment for defendant.

Cecil Brown, for plaintiff.

E. Preston, for defendant.

Honolulu, June 2d, 1882.

ESTATE OF W. L. MOEHONUA, Deceased.

IN PROBATE. BEFORE JUDD, C.J.

JUNE, 1882.

The presumption in favor of legitimacy of children born in wedlock, even though adultery be proven, must be held to apply to the ancient times in this country before marriage was introduced.

A claim of heirship, based on the alleged affiliation, by a chief, of a child whose mother habitually consorted with another man as her "kane," disallowed.

The Court distributes the estate of decedent among the claimants whose heirship is proven.

DECISION OF JUDD, C.J.

The late W. L. Moehonua died on the 8th of December, A.D., 1878. His property being considerably encumbered, the administrator was obliged to sell a large portion of the estate in order to pay the debts, and it was not until March, 1882, that the accounts were presented to the Court for approval and for distribution of the estate remaining.

At the hearing the following persons appeared as claimants: G. W. Keaweamahi and his sister Alapai (represented by

Kamika, her husband), who claim to be cousins of Moehonua, as children of Ialua (k.) and Keohoula (w.), Ialua being the brother of Napua, the mother of decedent. This is admitted to be true by all the claimants.

The claimant Moepali, who also calls himself W. L. B. Moehonua, claims to be a second cousin of decedent, as being the grandson of Kahaokamoku, a brother of Napua, Moehonua's mother. This claim is also not disputed.

Kekuaihe (k.), who claims to be a cousin of decedent, as being the son of Kaikuahine, who was the sister of Keaweamahi, Moehonua's father. This claim is disputed.

His Majesty Kalakaua, who claims the estate as being a nephew of decedent, the claim being that His Majesty's maternal grandfather Aikanaka, and not Keaweamahi, was the father of Moehonua. This claim is also disputed.

Moehonua left a widow named Kapeka, who afterwards married Keaweamahi, the first above-mentioned claimant, and died in 1881, leaving as her heirs-at-law her husband, and Kaailau, Keohokii, Kaepa and Komo, her brothers, and Kamahana, Kukuilau, sisters, and Nua a niece, and Lono, a nephew, children of a deceased sister named Kealoha.

One-half, therefore, of the estate of Moehonua descends, according to our statute, to the husband and heirs of Kapeka the widow, *i.e.*, one-quarter of the whole estate to G. W. Keaweamahi as her husband, and 1-28th each to Kaailau, Keohokii, Kaepa and Komo, Kamahana, Kukuilau, and 1-56th each to Nua and Lono.

I take up first the claim of His Majesty, as the alleged relationship of nephew will, if sustained, take to the exclusion of cousins.

The claim is, in substance, that Napua, who was the woman with whom Keaweamahi habitually consorted, and this "Kane" or husband of hers, were "Kahuas" or family retainers of the High Chief Aikanaka. That on one occasion, the chiefs and people being engaged in cutting sandal-wood in the mountains in the northern portion of this island (1824-25), Aikanaka

cohabited with Napua, and the issue of this was Moehonua, the decedent. His name (Moehonua) meant "sleeping on the ground," from the circumstances of Aikanaka sleeping on the ground at the time of the sandal-wood cutting. That certain articles were given by Aikanaka as tokens of his acknowledgment that the child was his. There are contradictions in the testimony as to what these articles were. One witness, Kawaililii, says they were a malo (a man's loin cloth), two lei palaoa (hair necklaces with a bone ornament pendant), one named "Nakuloki" and the other "Kooai," and also a "Leiomano" (an instrument made of shark's teeth, to be worn on the hand as an offensive weapon). Another witness (Manukahunaaiole) says the tokens were a malo, a large kahili (black in color), and a "Leiomano." Kaawaloa says the kahili was a white one. Kawaililii assumed, in her examination before the late Chief Justice Harris in 1880, to identify the two necklaces and the "Leiomano" when produced by claimant. Kaawaloa says the "Leiomano" was buried with Kaaua, the servant who had charge of them, and that the kahili was put in the tomb when Moehonua died. Members of the household say this kahili was one Moehonua bought.

None of the witnesses examined before me speak of any lei palaoa or necklace, and none of the witnesses examined in 1880 speak of a kahili as one of the tokens.

There are also contradictions as to when and where these tokens were given. Keliikahekili (w.), in 1880, says Aikanaka gave them, the necklaces, to Kaaua, at Kaawaloa, Kona, Hawaii; this must have been after the birth of Moehonua, for he was born at Mokuleia, Oahu, as this witness says, and yet this witness says she saw Aikanaka give the malo and necklace to Kaaua, and at another part of her testimony she says the malo was given to Kaaua at the time of the cohabitation.

Another witness, Kalola, says Aikanaka told her that he gave the tokens to Napua to signify that if she bore a child it would be his, indicating that the tokens were given before the birth of Moehonua.

But if it be conceded that the proofs are reasonably clear that Aikanaka did have intercourse with Napua, and certain tokens were deposited either then or at the birth, this can mean no more than to indicate his (Aikanaka's) belief that he was the father of the child. It was proved that this woman was not tabued and kept separate after her meeting with Aikanaka. It was also in proof that she continued to live with her husband, and though Aikanaka may have thought that Moehonua was his child there is no certainty that he was.

The policy of the law at present is in favor of legitimacy, and the rule exists that the presumption is in favor of the legitimacy of offspring born in wedlock even though adultery may be proven. I think this same rule must be held to apply to the times in this country before Christian marriage was introduced. I do not understand that there ever was in these islands a system which was nothing more than mere promiscuous and indiscriminate intercourse between the sexes. That polygamy existed among the chiefs is a matter of history, and this Court recognized this in one of the cases in the matter of the estate of Kanaina (July term, 1878). But while a man might have more than one woman consorting with him, there was a certain degree of permanency in this relation, and so a woman was commonly known as the "wahine" or wife of a certain man, and it by no means follows that the offspring born after a chance meeting of a man and a woman, the man not being the "kane" or husband of the woman, would or could be considered as the offspring of that casual connection. Moehonua was not considered as a chief or anything like the rank of Aikanaka.

The legend of "Umi or Liloa" is referred to by claimant's counsel as a parallel case. But here Umi presented the tokens (which had been deposited with his mother Akahiameainoa) to his putative father Liloa, who was King of Hawaii, and secured his full and complete recognition as his son. These were personal characteristics of Umi that left no doubt in the minds of any that he was the son of Liloa, and the public proclamation was equivalent to an adoption of Umi as his son. This element

does not exist in the case before us, for the tokens were not presented by Moehonua to Aikanaka, nor was his recognition secured; in fact, there is no proof that Moehonua was aware of the existence of the tokens.

To adopt the view of the claimants' counsel would throw the inheritance of native Hawaiians into inextricable confusion.

Every witness who was questioned upon this point says that the "kane" of Napua was Keaweamahi. From this Keaweamahi, Moehonua inherited, as his son and heir, the large land of Pulehunui, on Maui, the use of which he enjoyed for many years, and which was sold to pay the debts of this estate.

I feel obliged to hold that Moehonua was not the legitimate son of Aikanaka, therefore the claimant is not entitled to inherit this estate.

The claim of Kekuaihe is next to be considered. Not many witnesses were offered in support of his claim, but I think those that were examined are entitled to credence.

They say that Kaikuahine (k.) was a brother of Keaweamahi, and by Kahiko had this claimant. This branch of the family lived at Hilo, and the fact that witnesses who lived at Kona and on Oahu never heard of the relationship, is not conclusive against its credibility.

I think his claim is established and distribute the remaining estate as follows:—

One-twelfth to G. W. Keaweamahi (k.)

One-twelfth to Alapai (w.)

One-sixth to Kekuaihe (k.)

One-sixth to W. L. Moehonua, alias Moepali.

And, as above indicated,

One-fourth to G. W. Keaweamahi.

One-twenty-eighth to Kaailau.

One-twenty-eighth to Keohokii.

One-twenty-eighth to Kaepa.

One-twenty-eighth to Komo.

One-twenty-eighth to Kamahana.

One-twenty-eighth to Kukuilau.

One-twenty-eighth to Nua and Lono.

J. M. Davidson, for Keaweamahi and the heirs of Kapeka,
J. L. Kaulukou with him.

R. F. Bickerton, for Moepali.

F. M. Hatch, for His Majesty.

I. Nawali & W. L. Holokahiki, for Kekuaihe.

Honolulu, June 16th, 1882.

In re ALFRED RHODUS.

HABEAS CORPUS. BEFORE JUDD, C.J.

JUNE, 1882.

A mittimus in a criminal case is a "process," but not part of the "record:" where full light is not afforded by the mittimus, resort may be had to the record to ascertain what the sentence of the Court was.

In a mittimus it was stated that defendant was found guilty of assault with intent to murder, but the statutory words, "being armed with a dangerous weapon," were omitted: but it appearing from the Marshal's return to the writ of *Habeas Corpus*, that the prisoner is held under a valid sentence, he is remanded to custody and the writ discharged.

The petition alleges that it appears by the mittimus under which the prisoner is held by the Marshal of the Hawaiian Islands, that one Alfred Rhodus was convicted of the offense of an assault with intent to murder, and was sentenced to imprisonment at hard labor for the term of one year and to pay a fine of \$500; and the petitioner avers that said imprisonment and detention is unlawful, because the punishment of imprisonment with hard labor is not authorized by the laws of this Kingdom for the offense of assault with intent to murder.

The return of the Marshal shows that the prisoner Alfred Rhodus, having been convicted at the July Term of the Supreme Court held in 1881, for that, being armed with a dangerous weapon, to wit, a loaded pistol, he did assault one Moku with

intent to murder, was committed to his (the Marshal's) custody by virtue of a mittimus from the Supreme Court, which is given in full and which corresponds with the averments in the petition.

The truth of the facts set forth in this return is not denied.

The prisoner was, in fact, indicted, found guilty and sentenced for an assault, being armed with a dangerous weapon, to wit, a loaded pistol, with intent to murder, and the sentence imposed upon him was in accordance with the statute. The mittimus, in describing the offense, is correct as far as it goes, but leaves out the words of aggravation, *i.e.*, that the prisoner was armed with a dangerous weapon.

It is urged upon me that the mittimus is a "record" of this Court, that it imports verity upon its face, and that resort cannot be had to any other part of the record to ascertain the real character of the offense for which the prisoner was tried and of which he was convicted.

I consider that the mittimus is a "process" and no part of the "record" of a case. No copy of it is kept in the record. It is the authority by which the officer holds the prisoner. In cases where full light is not afforded by the mittimus, I think resort may be had to the record itself to ascertain what the sentence of the Court was. In the case of the *People vs. Cavanagh*, 2 Parker's Cr. Reports, p. 650, it was held that "when on *habeas corpus* it becomes material to know of what particular misdemeanor the prisoner was convicted, in order to determine whether the commitment was legal, resort may be had to the record," etc.

In the case before me, the mittimus, as I have said, omits words which are necessary to completely describe the offense, and which the return of the Marshal shows in full. I cannot say upon this showing that the prisoner has received an illegal sentence, and that, therefore, his detention is illegal.

It is true that there have been several instances where a prisoner has been discharged, the mittimus appearing to express an illegal sentence upon its face, but this was upon the assump-

tion that it corresponded with the judgment of the Court whence it proceeded and that this was itself illegal.

Suppose, however, a case where the sentence of the Court was shown to be illegal and not warranted by the law, but the mittimus showed a legal sentence, would not the prisoner be entitled to be discharged upon *habeas corpus*? I think he would.

I think it is requiring too much to insist that there shall be spread upon the mittimus the particulars of the indictment. To illustrate, there is a description of burglary where, if a person enters the dwelling-house of another in the night, even if no breaking be committed to obtain entry, but where a person not a party to the burglary is resident within such house, the offender being armed with a dangerous weapon at the time of entering or at any time while he is within the house, for which offense there is a punishment prescribed of imprisonment at hard labor not more than twenty years. I think it would be sufficient to describe this offense in the mittimus as burglary, and a failure to put therein any one of the somewhat complicated ingredients of the offense described in Sec. 12 of Chap. XIV., of the Penal Code, would not entitle a prisoner to be discharged.

It appearing from the return that the prisoner is held under a valid sentence of a Court of competent jurisdiction having present legal force, I do not feel authorized to discharge him. He is therefore remanded to the custody of the Marshal.

A. S. Hartwell & F. M. Hatch, for petitioner.

Attorney-General Preston, for respondent.

Honolulu, June 20th, 1882.

MELE *vs.* AHUNA *et al.*

NAKEU *vs.* AHUNA *et al.*

BEFORE McCULLY, J., IN INTERMEDIARY COURT.

JULY, 1882.

By decree of Water Commissioners, plaintiffs were held entitled to water at certain times, sufficient for their taro: it appearing that defendants have diverted a portion of plaintiffs' water, the Court awards damages: but as plaintiffs have not complied with the order of the Commissioners to clean out the water course, and have allowed defendants to neglect to furnish water on the designated days, the amount of damages is proportionately lessened.

DECISION OF McCULLY, J.

These two cases depend on the same state of facts. The several plaintiffs complain of defendants for damage done to their crops of taro by defendants depriving them of water to which they are entitled.

I take the award of the Water Commissioners to be the ascertainment and definition of the water rights of the parties.

From the testimony, and from a personal examination of the locality, it may be described as follows: The source of the water is a pond named Punahoolapa, with artificial banks of perhaps half an acre in extent, the pond being formed and fed by springs in the bottom. This is within the premises of the defendants, who are rice planters. A flume of boards conducts a portion of the water out of the pond to the east to a section of defendant's rice patches. A ditch leads from the side of the pond between other rice patches, through defendant's land and into the tract occupied by taro patches of sundry owners, the two plaintiffs included. Water can be admitted to the ditch by opening a gap in the wall of the pond, and is distributed to the several taro patches by connections with the ditch.

By the decree of the Water Commissioners the plaintiffs were

held entitled to water on Tuesdays and Fridays, twenty-four hours each day, sufficient for their taro.

The testimony is uniform on the part of the plaintiffs that they have not had it specifically on those two days of every week, and that they have not had sufficient for their crops at whatever time it has run, and that in consequence of the want of water their crops of taro have rotted and became a loss to them.

The defendants do not deny that the crops have been injured, and do not maintain that they have had water enough, but allege, in testimony, that the plaintiffs failed to get water, in part because they have neglected to keep their own water courses free from growth, whereby the water would not run to their patches; in part because they had refused to carry out the decree of the Water Commissioners which directed that the plaintiffs should unite with the defendants, contributing an equal amount of labor, in clearing out the rushes and other swamp growth which had overgrown the pond and choked the springs. It is in proof and not denied that the plaintiffs have not carried out this part of the decree, nor have they paid the defendants the equivalent, as the commissioners prescribed, of one dollar a day per man, and it is in proof and not denied that the defendants have done work in clearing out the pond to the value of \$408.70. There is an admission on the part of Ahwo, one of the defendants, and the manager of the place, that as summer has advanced water has become scarce, much less now than before; and the principal defendant (Ahuna) testifies that it has been quite dry (weather) the last two months, and that he has had to use more water in his rice plantation, giving to the natives (plaintiffs) what he did not require.

The plaintiffs and their witnesses further testify that the defendants turned off water which might have run through to the taro patches into a reservoir of some description where it was of no value for irrigation to either party. The defendant's witnesses testify that this diversion was from their own ditch, and not of water which might avail the plaintiffs. My ex-

amination of the place, in company with the parties, shows that this water comes from the ditch which feeds the taro patches, runs through two small rice patches of defendants and into a sink hole in the coral rock where it is lost for irrigation, though some use of it is made as a pool for washing clothes. It is all within the defendant's premises. Some of the water running to the sink hole was said to be from another source than the Punahoolapa and the ditch from there to the taro patches, and to have been carried across this ditch by a short flume. Upon examining in this respect I find that this outside water forms a small part of this contribution, the most of the water which may have been carried across in the flume coming through the rice patches from the second outlet of the pond near the one which feeds the ditch, the greater portion, though, coming from the pond via the main ditch.

In any view there is a diversion here of water by the defendants, which is much needed by the plaintiffs, and I am unable to find in the testimony, or by a view of the premises and hearing at that time anything which the parties wished to represent, why this diversion of water should have been made. The plaintiffs' taro was suffering for the want of it. Washing could have been done elsewhere. This diversion strongly induces the opinion that the defendants have acted in disregard of the plaintiffs' rights. This in addition to what may be called the pressure of the situation. The area cultivated in rice is larger than that cultivated in ancient times with taro, the defendants having bought new land under cultivation with a water crop, and at the same time the water supply has probably diminished with the progressive drying of the country and the advance of summer. The defendants have the water pond on their premises and within their control. Their crop demands the water and they help themselves first.

On the other hand, the plaintiffs have not carefully followed their prescribed rights and duties as defined by the Water Commissioners. They do not seem to have asserted their rights on the two days per week given them for watering, and they have not performed the labor prescribed to be done on certain days in

clearing out the spring, whereby the supply would be made sufficient for all entitled thereto. They say for this that they were not summoned to work by the defendants, which the defendants deny, and that they did not feel authorized to enter the defendants' premises and take the water which belonged to them. But they must have seen the defendants performing that labor on the pond by which a supply of water was to be procured for both parties, and they chose to stand by, doing nothing, yet ready to avail themselves of the results of defendants' labor.

But as the decree of the commissioners gave the plaintiffs "sufficient water," and as it is presumable that the taro patches had had water from ancient times, and that there would have been enough for the taro if rice had not been so extensively cultivated, I shall hold that it was the duty of the defendants, having control of the water-head, to let down a sufficient supply for the plaintiffs on their assigned days, and that having, as the proofs stand, failed to do this, and furthermore, having turned off an amount of water which would have availed the plaintiffs measurably, and the plaintiffs having suffered a loss, the defendants are now liable in damages.

The amount claimed in each case is \$200, the limit of the jurisdiction of the Court. I take into considerable account the failure of the plaintiffs to do what they might have done towards getting water by carrying out the order of the commissioners to clean out the pond, and in suffering the defendants to neglect to give them their allowance of water on specific days, and so award lower damages.

The plaintiff Mele has less land than Nakeu. I follow the judgment of the District Justice and award him \$50 damages, with costs.

The plaintiff Nakeu has ten patches, but they have not all been dried to their damage, some are newly-planted and will not suffer if now duly watered. I adjudge him damages \$125 and costs.

R. F. Bickerton, for plaintiffs.

A. S. Hartwell, for defendants.

Honolulu, July 12th, 1882.

KAUPONO *et al.* vs. NAOHO.

EJECTMENT. BEFORE AUSTIN, J.

JULY TERM, 1882.

A verdict and judgment in ejectment have same force as other judgments; but, in analogy to old rules and reasonings, a little more liberality should be exercised in granting a new trial in ejectment than in other cases.

New trial granted for newly-discovered evidence.

DECISION OF AUSTIN, J.

This is an action of ejectment. The verdict was in favor of defendant.

By the common law, and by the law of several of the United States, the first verdict and judgment in an action of ejectment are not a bar; a second trial, and even a third may be had. This was upon the idea, doubtless, that the title to land should be assured with every possible care.

The law allowing a second new trial, as a matter of course, is not law here, and a verdict and judgment in ejectment have the same force here as other judgments. However, in ejectment cases, in analogy to old rules and reasonings, I think a little more liberality should be exercised in granting new trials than in other cases.

In the case at bar the question was one of identity of a grantor and patentee, and was a close one.

The plaintiff claims to present newly-discovered evidence. The witnesses named are Their Majesties the King and Queen. Their affidavits are not presented and objection is made on that account. The object of requiring such affidavits is to make sure that the testimony is real. I think the high position of the witnesses in this case is sufficient assurance of the reality of the proofs offered. I shall overrule that objection. The defendant claims that the evidence is cumulative, and that due

diligence has not been used by the plaintiff in obtaining the evidence.

His Majesty states that he is now willing to testify in this case. Without this consent he could not be compelled to testify, and his evidence could not have been obtained, it would seem, at the last trial.

His Majesty states: I am very well acquainted with Keaka, claimed to be grantor of the plaintiff; I know where he lived at Pauoa; I saw the Royal Patent of the land at the time Keaka wanted to sell a part of it; that's the land described in that Royal Patent.

This I think is not cumulative, and is material. The other testimony might perhaps be objected to, though it seems strong.

On the whole I am inclined to grant a new trial. Let a new trial be ordered.

J. L. Kaulukou & J. Russell, for plaintiffs.

J. M. Davidson, for defendant.

Honolulu, July 29th, 1882.

SHIPMAN & ELDARTS *vs.* COMMISSIONERS OF
CROWN LANDS *et al.*

IN EQUITY. BEFORE McCULLY, J.

AUGUST, 1882.

Plaintiffs, as lessees of a sea-fishery, ask for an injunction against trespass and fishing by defendants; on the ground that some of defendants are insolvent and could not respond in damages, and because to sue for damages would occasion multiplicity of suits:

Held, that no irreparable damage to the fishery is shown: and plaintiffs have an adequate remedy at law both by an action for damages, and also, under §396, Civil Code, by a criminal proceeding.

Injunction refused.

DECISION OF McCULLY, J.

The complainants set forth that they are the lessees by proper assignments of a lease made by the Crown Land Com-

missioners of the Ahupuaa of Waiakea, and exhibit the lease. This demises the Ahupuaa or land of Waiakea, according to metes and bounds, and containing an area of 95,128 acres. From this are reserved four acres which may be selected by the Government for a wharf lot, "not to interfere, however, with any fish pond or place for collecting spawn of mullet;" also reserving a certain portion which had been included in "the Weltse survey of Humuula," but with the privilege of leasing this portion when an existing lease should expire, and also reserving a lot previously leased by survey, containing three acres and seven rods, and excepting the timber trees, "to have and to hold all and singular the said premises above mentioned and described, with the appurtenances, except as before excepted." Where this land touches the sea, in Hilo Bay, the boundary is "to high water mark, sea shore, thence along sea shore in an easterly direction 818 feet, etc."

The complainant alleges that all the fishing rights appurtenant to Waiakea passed by the lease as appurtenances, not reserved, and that the complainants went into possession of the same in the month of September, 1877, and enjoyed the possession thereof till the month of ———, 1881, when their rights were interfered with by the defendant Judd, then and now Commissioner and agent for Crown Lands, who gave verbal license and privilege of free fishery to the defendant Spencer and to all the inhabitants of Hilo and Waiakea; since when, many inhabitants of Hilo and Waiakea, whose names are unknown to complainants, have fished, and the defendant Spencer has procured large nets, one of which he has leased to defendant Mahoe for half the fish caught, and that Mahoe has commenced his fishing. That complainants have notified and warned all parties against trespass on this fishery without avail. That complainants had previously enjoyed a revenue of about \$300 per year, of which they are now deprived.

The bill avers that a suit at law would be unavailing against said trespassers upon their fishery rights aforesaid, because of a multiplicity of suits, and because all of those whose names are

known to complainants are insolvent and incapable of responding in damages, and because a suit against one or many defendants will not prevent the trespass (of others), nor can there be an adequate remedy in damages; that if said trespasses are suffered to be continued, the injury will be irreparable, and that their only remedy is in equity and a writ of injunction to stay the continued trespass on their fishing rights, and prays for such injunction.

The defendant, Crown Land Commissioner Judd, answers denying the right of the complainants to the fishery. The defendant Mahoe answers that he is a tenant of and lives on the Ahupuaa of Waiakea, and as such tenant has a right to fish and has only fished according to his right. The defendant Spencer is in Court, but makes no answer, and no other parties are cited.

The complainants adduce no evidence except that of Mahoe, who reports that he is a tenant, states that he has made a haul of fish with a seine of defendant Spencer and gave him half the proceeds. He has lived in Waiakea forty or fifty years, and there is some other testimony as to the extent of the fishery and the ownership of that part in which he hauled the seine, which, in the view I take of the case, need not be repeated here, and of defendant Spencer that he furnished the seine to Mahoe. Defendant Judd also stated that he had given license to the public to fish in the sea-fishery of Waiakea. No names of other trespassers are given, or of other acts of trespass, except the general statement by Mahoe that it is now considered that the fishery is free.

What ground is shown by the bill and testimony for issuing the injunction prayed for?

As against the defendant Mahoe, he is a tenant and has a right to fish, subject to the right of the Konohiki to reserve one species of fish. Civil Code, Sections 387 to 391.

The defendant Spencer has not fished at all. The defendant Judd has not fished, and no other parties are before the Court.

Furthermore, how are the grounds upon which an injunction

is prayed for, sustained? There is no proof offered to show that the parties defendant are insolvent, any one of them, that they may not respond in damages.

It is not shown in any manner that an irreparable damage is being done to the fishery. Courts of Equity will grant injunction, for instance, when a mere trespasser digs into and works a mine to the injury of the owner, because it operates a permanent injury to the property as a mine. So when there is a dispute respecting the boundaries of an estate and one of the claimants is about to cut down ornamental or timber trees in the disputed territory. And in all cases of timber, coals, ores and quarries, when the party is a mere trespasser, or when he exceeds the limited rights with which he is clothed, upon the ground that the acts are or may be an irreparable damage to the particular species of property. Story's Eq. Jur., Sec. 929; except to stay waste or prevent some irreparable mischief, an injunction is only issued as ancillary to some primary equity. *Schofield vs. Van Bokkelen*, 5 Jones Eq., 342.

But no testimony, no observation of counsel, and nothing known to the Court shows that the trespass, if it is such, upon the fishery claimed by complainants does it an irreparable injury; that the fishery is thereby impaired or destroyed for the future. It is an ocean fishery in the open sea of Hilo Bay, and it is not offered to be shown that it will not be as much the resort of fish when the hauls cease as before.

Besides irreparable damage, it is alleged that there is not an adequate remedy at law. This is not correct, for the remedy at law by actions of trespass is constantly pursued in the Courts of this Kingdom, and the right in fishing grounds ascertained and protected thereby. Section 396 of the Civil Code expressly gives District Justices jurisdiction to try, and punish by imposition of a fine, any tenant or other person who shall wilfully deprive any Konohiki of his fishing rights. This is in addition to the general right of civil action in consequence of any injury direct or consequential to plaintiff's property. In such action the right of these complainants to this fishery by

the terms of their lease may be raised and determined. So it seems to me the complainants fail in any case and against any parties to make a case for injunction on this ground also.

Upon these considerations, touching first the proofs shown as to these parties defendant, and secondly as to the remedy by injunction on the legal grounds set forth, the prayer of the bill is denied.

W. Claude Jones, for plaintiffs.

E. Preston, for defendants.

Honolulu, August 5th, 1882.

A. J. CARTWRIGHT, Trustee of J. H. Coney, deceased, *vs.*
S. C. ALLEN & M. P. ROBINSON.

IN EQUITY. BEFORE JUDD, C.J.

SEPTEMBER, 1882.

The borrowing of money by an executor, and the pledging by him of securities in his hands, held to be unauthorized: but the pledgees not being put upon enquiry as to the executor's misapplication of funds, and the misapplication not being fraudulent, the Court declines to compel the giving up of the securities by the pledgees.

DECISION OF JUDD, C.J.

This is a bill in equity to compel the surrender of a note in favor of plaintiff's estate for \$30,000, held by defendants as collateral security.

PLAINTIFF'S BRIEF.

The bill avers:

1st. The purport of Coney's will.

2d. The plaintiff's receipt of \$13,137 from the executor, Edward Preston.

3d. Castle & Cooke's indebtedness to the estate on their \$30,000 note, of which they have tendered payment, but said note is held by defendants (co-partners under the firm name of

Allen & Robinson) who, although requested, refuse to deliver it up, claiming that it was pledged to them by Preston as security for \$15,000 loaned to him for the use of said estate; avers that this loan was neither required by the estate nor authorized by the will.

4th. Offer to pay defendant said loan of \$15,000 (although denying its validity) on their giving up the said Castle & Cooke's note in order to divide the moneys of the estate according to the will; defendants refuse to accept this and continue to charge the estate interest on said \$15,000, and to collect and appropriate the interest on said Castle & Cooke's note, and have appropriated \$1230 of said interest towards payment of said \$15,000.

Prayers: 1. For account.

2. Delivery of Castle & Cooke's note on payment of \$15,000.

3. General relief.

The answer: That as to said first averments, defendants "know nothing," and deny all the allegations and say that said firm has not in their possession said note of Castle & Cooke, or any other note to which said complainant is entitled.

The answer is sworn to by S. C. Allen.

EVIDENCE.

Defendant S. C. Allen under a *subpoena duces tecum* produced said note of Castle & Cooke, also two notes in favor of Allen & Robinson, as trustees, of \$3000 and \$12,000, signed by Edward Preston, executor, and dated respectively February 19, 1881, and January 21st, 1882, but refused to produce certain Kohala stock which he was subpoenaed to produce, and which he testified that he took as collateral for Castle & Cooke's note of \$30,000.

Allen testified that he and Robinson did not hold the above notes, but that the trustees of James Robinson's estate held them. That he had never read Coney's will (although the record produced of his evidence at the probate of the will is that he read it, and the same record shows that he and Preston filed

their sworn petition for probate of the will). Allen also testifies that he kept the Coney estate accounts until he resigned as executor (that is, from the filing of the petition, October 22d, 1880, to the probate of the will November 23d, 1880). Also, that he took Castle & Cooke's \$30,000 note and the Kohala stock from Coney as collateral for notes of Mr. Coney's for \$500, \$1500, which said notes were paid by this plaintiff after he took the trust. He denied that any one had offered to pay him the \$15,000.

Atherton, of Castle & Cooke, testified that Preston some time last year told him he might pay the \$30,000 at any time, waiving the three months required by its terms; also that Castle & Cooke, if called upon, would willingly have paid from \$5000 to \$10,000 on said note at any time.

Cartwright testified that he told Allen he should be ready to take up Preston's notes, but Allen said he would not take the money on them before they were due.

Hartwell testified that as attorney for Cartwright he offered Allen to pay him the money on the Preston notes, but it was refused.

Preston testified that he used the \$3000 for the estate to build Levey's house, etc., but not the \$12,000; that they borrowed the \$12,000 to pay the heirs, but had not conferred with them about it specifically, when his attention was called to his accounts showing receipts more than enough to pay for the taxes and Levey's house before the date of his \$3000 note; he says he first borrowed \$1000 of Allen & Robinson and afterwards \$2000, and then gave the \$3000 note.

POINTS FOR PLAINTIFF.

I.

As for the formal defense that these defendants hold these securities as trustees of James Robinson's will and not in their own right, that is a matter for a plea in abatement.

Story's Eq. Pl., §723, §732. And not to be raised by an answer. *Ibid*, §708.

II.

1. The will authorizes no borrowing of money for any purpose.

It requires the shares of Mrs. Coney and the others to be paid only after the payment of the debts. Preston and Allen both knew this, for they had presented the will for probate and must at least be presumed to have known its contents. Allen acted as executor *de son tort* until he resigned. The notes held by Allen bearing twelve and ten per cent interest were long overdue amounting to \$—— in all. Both Allen and Preston knew that these notes should first have been paid. Castle & Cooke were ready at any time to pay enough to take these notes up.

Preston's accounts show that he took from Allen & Robinson \$3000, December 22d, 1880, for interest on Castle & Cooke's note. He could have taken the same in 1881. Those accounts show that the money for Levey's house was paid January 29th, 1881 (\$3110.68), before the \$3000 note was made. No one could find authority in the will or in common sense for any of these doings. The estate has been kept unsettled and put to unjust and unnecessary loss by the course that was followed.

The executors account shows receipts (including \$12,000 of Robinson's Trustees)	\$26,391.00
Charges, including \$1400 commissions and \$5910.68 on account Levey's house, and \$964.69 for purchase of land, none of which are authorized by the will	14,321.60
	\$12,069.40
	2,910.00
	\$14,979.40

This of itself shows plainly that the \$12,000 loan was not required. It was not pretended to be used for the estate. Deducting the commissions, \$140, and the items for the house and land which the will did not authorize, and \$10,185.37 would remain, showing that the \$3000 loan was not required, and that the 12 per cent notes with Allen and Robinson might have been paid.

2. The \$12,000 note has a memorandum that it is given as

collateral security with Castle & Cooke's note for \$30,000, with shares in Kohala Sugar Company now held by the said trustees for advances heretofore made to J. H. Coney and myself as executor aforesaid. This implies that the executors did not receive said \$12,000 on that \$12,000 note (it does not purport to have been for value received); but that he gave it merely for "collateral security." The inference is that after he was called on to pay over the money in his hands he got the \$12,000. Certainly the defendants cannot expect the Court to say that the words above quoted mean anything but that which they purport to mean. Everything is then referred back to the \$3000 note dated February 17th, 1881, which Mr. Preston says was for money of which a large part had been borrowed in the month of December, A.D., 1880, or just after Allen resigned as executor. When it is considered that Allen kept the estate's accounts up to November 23d, 1880, which show receipts of the estate amounting at that time to \$4039, and outlays of only \$395.25, giving a surplus of \$3642.73, and when he knew that \$3000 interest money was coming in December 22d from the Castle & Cooke's note, could he have supposed that a loan of \$3000 was required for any purpose named in that will?

He knew it was not required to pay the notes held by him of Coney, for he did not wish and did not take the money for them.

III.

On the facts in this case the law is clear. "One who receives the assets of the estate from the executor, knowing or having the means of knowing that he is thereby misapplying them, will be held as trustee for the estate. 3 Redfield on Wills, p. 228 n. 8, citing *Colt vs. Lasnier*, 9 Cow., 320.

So where one or two executors and trustees under a power in a will sold part of the real estate and took a mortgage payable to them jointly for purchase money. Afterwards one of them, without the knowledge of the other and when the money was not wanted for the purpose of the trust, sold and assigned such bond and mortgage and misapplied the proceeds and

failed, being largely indebted to the estate. It was held not to be a valid sale and transfer of the legal title, and that the purchaser could only claim to be protected in equity so far as the money or securities given by him to the trustee of whom he purchased could be shown to have been applied to the use, or in aid of the purpose of the trust."

Ibid., p. 229, citing *Hestell vs. Bogert* 9 Paige, 52.

In *Atkins vs. Atkins*, 8 Allen, 15, it was held that shares held by a guardian and transferred by him in payment of a personal debt, may be pursued as a trust property in the hands of a purchaser having notice.

"The occasions for creating such contracts, pledges, etc., on behalf of the estate are so few, that slight circumstances of suspicion will be regarded as sufficient to put the mortgagee upon his inquiry. And in such cases if the fact was that the money was raised for private purposes by the executor, and this upon proper enquiry would have been ascertained by the party making the advance, he will stand in no better light than if he had received a pledge or mortgage of the effects of the estate upon the private account of the personal representative, and cannot enforce his security except to the extent that he can show that the money advanced by him actually went for the purposes of the estate in payment of the debts and legacies, or otherwise."

3 Redfield on Wills, p. 231, Sec. 5.

"When the purchaser has knowledge that the sale is not within the equity of the trust under which the power was created, he thereby assumes the hazard of seeing to the application of the purchase-money."

Ibid., p. 233.

"Therefore, if an executor sells or mortgages personal assets for ready money or money to be advanced, the dealing *prima facie* is in due course of administration, but *prima facie* only; for if there is affirmative evidence that the purchaser or mortgagee had notice that the money was to be used for some purpose other than the settlement of the estate, the Court will regard the transaction as fraudulent, and will not allow it to stand."

2 Perry on Trusts, p. 446, §811; *Ibid.*, p. 447, §814; and see *Pendleton vs. Fay*, 2 Paige, 202.

The \$1230 appropriation of the estate money to a note not due was, whether by mistake or not, a misappropriation, and of itself entitles plaintiff to a decree.

See also *Smith vs. Ayer*, 101 U. S. 327.

DEFENDANTS' BRIEF.

The evidence shows that Coney in his lifetime deposited with defendants a note from Castle & Cooke for \$30,000 as collateral security for money loaned to him; and that Edward Preston, executor of said Coney's will, borrowed more money from defendants, stating that it was for the use of said estate, and made a further charge upon the note of Castle & Cooke to secure the payment of the amounts advanced to him as executor.

The executor had the right to pledge the note of Castle & Cooke to secure the payment of the amounts advanced to him, and there is no equity in plaintiff's bill.

The general rule is that an executor has an absolute power of disposal over the personal estate of deceased, and the same cannot be followed by creditors, much less by legatees, into the hands of an alienee.

Williams on Executors, p. 796; *Whale vs. Booth*, 4 T. R., 625.

An executor may mortgage the assets of the estate.

Williams on Executors, p. 797; *Meade vs. Orrey*, 3 At. 239 (Hardwicke); *Scott vs. Tyler*, 2 Dick., 725 (Thurlow); *McLeod vs. Drummond*, 17 Ves., 154 (Eldon).

Title to personal property vests in executor. It cannot be followed into the hands of a purchaser unless there is proof of collusion.

Sneed vs. Hooper, 5 Am. Decis., 691; *Woods' Appeal*, 92 Pa. St., 379; *Hamrick vs. Craven*, 39 Ind., 241.

A power to sell for the purpose of distribution is a power belonging to an executor *virtute officii*, as well where the power is discretionary or absolute.

Evans vs. Chea, 71 Pa., 47.

A mortgage of assets by an executor is valid.

Vane vs. Rigden, L. R. 5 Ch., 663; *Perry vs. Gibbon*, L. R. 8 Ch., 141; *Cruikshank vs. Duffin*, L. R. 13 Eq., 555.

It is not incumbent on a mortgagee or alienee to see to the disposal of the purchase money, unless the trust is special.

Williams on Executors, p. 798; *Andrews vs. Sparahawk*, 13 Pick., 393; Story Eq. Juris., §1124 *et seq.*

The late case of *Carter vs. Bank of Lewiston*, 71 Maine, 448, is directly in point and supports this defense. An executor pledged stock belonging to the estate and gave his own note for the money, stating that it was for the purposes of the estate. The pledge was held valid and an action brought by administrator *de bon. non* for possession of the stock dismissed.

As to the duty of a person dealing with an executor to examine as to the condition of the estate and as to whether the debts are paid, see *Field vs. Schuffelin*, 7 Johns. Ch., 150, in which case Chancellor Kent says that in the absence of proof or knowledge of an intended misapplication, a person dealing with an executor is not bound to inquire into the state of the trust, because he has no means to support the enquiry, and he may safely repose on the general presumption that the executor is in the due execution of his trust.

BY THE COURT.

The questions before me are whether borrowing of the money and the pledging the securities of the estate of J. H. Coney by the executor were authorized or necessary under the circumstances. I have already held in the Probate Court that they were not. The remaining question is whether the defendants, the pledgees, had knowledge of the want of authority of the executor in making transaction so that the securities can be recovered now.

I do not find that the defendants had such a knowledge of the condition of the estate and the nature of the trust, or that the nature of the transaction should have put them upon enquiry as to whether there was a misapplication intended.

The will authorized the payment of one-quarter of the personal estate over to two of the legatees after the debts were paid, and the defendants might have supposed that this was a discounting of the assets to effect this purpose, or to pay the debts with, for there is no evidence that defendants knew that the estate owed no other debts than to them.

In the case before me there was no fraudulent misapplication of the funds borrowed, they were merely held idle by the executor, and for that reason the Probate Court charged the executor with interest upon them and declined to allow his commissions upon the same.

The last case cited by plaintiff from the Supreme Court of the U. S., 101 U. S. 327, clearly establishes that assets of an estate can be recovered from parties who deal with the executor with a knowledge of his trust and his disregard of his obligations, or when one has reasonable grounds for believing that the executor intends to misapply the assets or is in the very transaction converting them to his private use. In the case there decided the executor raised the money, not for the estate or for the settlement of its affairs, but for the business of a commercial firm, and the Court held that persons dealing thus were bound to look into the authority of the executor.

I do not regard the endorsement upon the executor's note for \$12,000 of the \$1230 received as interest on the \$30,000 note, which was stated to be made by mistake, as a misappropriation sufficient to find for plaintiff on the bill.

The fact that the executor, with funds in hand, allowed notes held by defendants to remain long unpaid is a matter between the trustee or heirs and the executor, for which defendants were not responsible.

A. S. Hartwell, for plaintiff.

F. M. Hatch, for defendants.

Honolulu, September 16th, 1882.

H. HACKFELD & CO. *vs.* E. BAL.

IN EQUITY. BEFORE JUDD, C.J.

SEPTEMBER, 1882.

Plaintiffs in equity seek to set aside a judgment at law against them, on the ground that an accord and satisfaction pleaded against them in the action at law was obtained by fraud:

Held, that although equity will in proper cases set aside a judgment at law, in this case the fraud could have been set up in the action at law as a part of plaintiff's case; and as this was not done, the Court sustains demurrer to the bill.

DECISION OF JUDD, C.J.

This is a bill in equity, alleging that at the last October Term of the Supreme Court the plaintiffs brought an action against the defendants, claiming \$38,881.68 on a book account, and that their declaration was afterwards amended by inserting the name of G. Armstrong as a co-defendant. That at the last January Term of this Court the jury rendered a verdict for the defendant Bal, but no answer or appearance was made for Armstrong, and no verdict or judgment rendered or made as respects him. That final judgment in favor of said Bal has been rendered, and costs taxed to the plaintiffs for \$1056.07. That in the action Bal admitted the account, but claimed as his only defense that the plaintiffs had agreed to release him upon his delivering to them certain property, which defense the Supreme Court in Banco held was conclusively established by the verdict of the jury, 4 Haw., 478. That the plaintiffs had consented to release Bal from their claim on his delivering to them certain steers, six in number, upon his representation and assurance that he owned no other property, and plaintiffs aver that at the time when they so consented they believed the assurances to be true, but afterwards ascertained that Bal was then entitled to about seventy-five head of cattle which he had bought with his own money but which he had caused to be placed in his son's name.

Wherefore the plaintiffs allege that their consent was obtained by fraud and misrepresentation, and ought not to be held binding upon them in equity. The bill prays for process of citation, for an injunction against the collection of the costs; that the verdict and judgment be vacated and set aside, and that the plaintiffs be allowed to move for judgment in their behalf and for general relief. The bill is demurred to and a plea in bar is filed setting up the judgment of the Court in the action at law.

The plaintiffs urge that no judgment for both defendants can stand on an agreement by parol to release one of them, citing 22 Pick., 308, and 1 Gray, 636, where it is held that a parol release of one joint debtor will not discharge the other from liability.

But in this case no effort is made to hold Armstrong liable. He is not a party to the bill, and the question as to whether the defense interposed by Bal inures to his benefit is not raised by the pleadings. If it were, I should be obliged to hold that an accord and satisfaction made by one joint debtor extinguishes the entire debt. The substantial ground for relief claimed in the bill is under allegations that the consent to release Bal was obtained by fraud and misrepresentation; that he had no other property than that which he had agreed to surrender, whereas he had other property. The plaintiffs do not contend that at the trial of the action of law they were ignorant of the existence of the facts as to the other property of Bal, upon which they found their allegation of fraud in procuring the consent to release. Under the recent decision of *Mills vs. Briggs*, 4 Hawn., 506, equity will relieve against a judgment at law where it is clearly against conscience that the judgment should stand. But the complaining parties must show, either that they could not have availed themselves of these facts in the trial at law, or that they have been prevented by fraud or accident from so doing, unmixed with their own negligence or fault. 2 Story, Eq. Jur., Sec. 887. Now it seems to me that the failure on the part of the plaintiffs to interpose the defense of fraud and misrepresentation in procuring the agreement to release in the

action at law, is fatal to them here. But it is said that the allegation that the obtaining of the agreement to release was by fraud, was not within the issue raised by the defense.

I think if fraud is alleged it can be proved at any stage, even if it require the issue to be raised by a replication.

In the case at law, the defendant Bal showed an accord and satisfaction, that in consideration of his receiving a release by plaintiffs of their claim against him, he would surrender all his property to them. He contended to the jury that he had made satisfaction, and the plaintiffs contended that he had not, but had kept back certain steers. It would have been quite competent for the plaintiffs to show in rebuttal, if they could, that Bal had a number of cattle held in his son's name to conceal them from his creditors, and if the jury found that this was the fact and that he had not surrendered them, it would disprove the defense of satisfaction. As I understand it, relief will only be granted in equity when the defense could not at the time, or under the circumstances, be made available at law, without any laches of the party. 2 Story Eq. Jur., §894.

Having found that the plaintiffs could have made this attack upon the defendant's defense in the law action, I think he cannot avail himself of it now.

The demurrer is sustained.

A. S. Hartwell, for plaintiffs.

R. F. Bickerton, for defendant.

Honolulu, September 11th, 1882.

PUPUKA *et al.* *vs.* MAIWELA *et al.*

EJECTMENT. BEFORE JUDD, C.J.

NOVEMBER, 1882.

§1007, Civil Code, allows an appeal on points of law to the Supreme Court in Banco from decision of a Circuit Judge in Probate.

An absolute deed, admitted to probate as a will, is conclusive on all parties, unless probate is revoked.

DECISION OF JUDD, C.J.

This is an action to recover one undivided fourth of a parcel of land situate in Wailua and Kamaee, in Hilo, Hawaii, granted by Royal Patent No. 2367, to Kaualii and Kalepo, and consisting of 136 acres. The plaintiff Pupuka (w.) is admitted to be the sister of Kaualii, one of the patentees, and claims in her own right as his heir, and shows a deed to herself from Mahiki (k.), a brother of the said Kaualii, of his interest in this estate. The defendant Maiwela is admitted to be the widow of the said Kaualii.

The defendant Kalepo appears claiming only one undivided half of this land and disclaiming as to the rest.

The defendant Maiwela introduces a paper certified by Hon. F. S. Lyman, a Circuit Judge of the 3d Judicial Circuit, to have been admitted by him on the 28th August, 1880, as a will of the said Kaualii, devising this estate to the said Maiwela.

It is admitted that the proceedings in the Probate Court were regular, and that plaintiffs were present in Court as contestants.

The paper introduced appears to be in the form of an absolute deed from Kaualii to his wife, and counsel for plaintiff contends it is void.

Counsel for defendant contends that the probate of this instrument as a will is conclusive in every Court until revoked, and that the plaintiff should have appealed if dissatisfied.

Against this view it is contended that there is no provision in

the law for an appeal to the Supreme Court in Banco from a Circuit Judge sitting in probate.

In my opinion Sec. 1007 of the Civil Code allows an appeal from a Circuit Judge sitting in chambers as a Probate Court to the Supreme Court in banco, if on a point of law, and by the Act of December 31st, 1864, an appeal on the facts may be heard by a jury in the Circuit or Supreme Court, providing the estate be of the value of \$500.

Is the probate of this instrument conclusive? It may often happen that a paper, apparently a deed, may have a testamentary character of which the Probate Court is to judge. Such was the view of this Court in the case of *Kapela vs. Hoohoku*, 4 Hawn., 513.

The case of *Keliipelapela vs. Pamano*, 1 Hawn., 280, is in point and is authoritative. Here the Court held that "the due admission of a will to probate by a Court of competent jurisdiction, the judgment being unrevoked, is conclusive as to the validity of the will and binding upon all persons."

The proper remedy is there suggested to be an application for revocation of the probate. I think the certificate of probate covers more than the mere formalities of due execution before the requisite number of witnesses and the sanity of the person executing the paper, and includes the question whether the paper was a testament or not.

Judgment for defendants.

Cecil Brown, for plaintiff.

W. R. Castle, for defendants.

Honolulu, November 1st, 1882.

K. JUBEY *vs.* J. W. PUNI *et al.*

IN EQUITY. BEFORE MCCULLY, J.

NOVEMBER, 1882.

A partnership held to be proved by circumstances, there being no written agreement: and an accounting ordered.

DECISION OF MCCULLY, J.

The question to be determined is whether there was a partnership between plaintiff and defendant in respect to the crop of twenty-three acres of sugarcane at Koloa, Kauai, grown for the Koloa Sugar Company's Mill, as is claimed by the plaintiff, or whether the plaintiff was a servant employed as overseer of the work, as claimed by the defendant.

There is no written agreement of partnership.

Neither of the partners is a business man.

The evidence as to their transactions with each other is vague, and, in important respects, conflicting.

I will endeavor to summarize the several items of testimony offered for the determination of the case, and comment on their bearing and effect.

The transaction commenced July, 1878. The plaintiff shows a letter dated July 29th, 1878, written by the defendant from Koloa, to him in Honolulu, where he had gone for the purpose of shipping men for the enterprise. This letter was imperfectly rendered into English at the trial. I have given it some study since. The writing is not always clear, and I think it is characterized by the imperfect, broken native which some Hawaiians use in addressing foreigners who, they suppose, are not well acquainted with their language. I translate it as follows:

Koloa, July 29th, 1878.

To JUBEY, Japanese, Pelekane, Honolulu.

Aloha between us. I have received your letter speaking of

Hackfeld & Co.'s shipping (men) in the name of J. W. Wright & Co. for the Koloa Company. So let my name be written outside the shipping contract, that they are to labor with me for the time they contract. I to refund the money formerly paid on the land. (?) Just as we formerly spoke of, so in all respects shall it be. Don't forget to give aloha to Umeke and Koko. If you want Koko to come back here let him come. I am not angry with you as your letter indicates.

Jube, don't fail to look up shipped men. If (or when) you get five men, return and we will unite in raising cane—so I did with Kiana, Chinaman; I didn't trick him. I divided equally the money with him. It was done the same by John Hobbs. We know about that. His Kanakas remained with him till his death. Truly, Amen.

With much aloha,

J. W. PUNI, Koloa.

Defendant's testimony concerning this letter is that the partnership which had been proposed depended on plaintiff's furnishing capital. He nowhere shows how much capital was required from plaintiff, and that as plaintiff failed to get capital the project of partnership failed and plaintiff labored for defendant on wages.

But plaintiff testifies that he did furnish \$258, and it was with that money that he went to Honolulu, paid his expenses and the advances of such men as he got. He produces the labor contract of one man shipped to himself.

My inference from this section of the testimony is that the parties had come to their agreement as to partnership, and that plaintiff came to Honolulu in pursuance of the partnership. The plaintiff is definite in his statement of the amount he furnished; the defendant does not say how much he required. He makes a general denial of plaintiff's contributing anything. Besides, it will be seen the partnership was based on the plaintiff contributing most of the personal labor, and defendant most of the cash, although this was done for the most part by the Koloa Sugar Company as advances on the crop.

In this visit to Honolulu the plaintiff broke up a building he owned here and sent the lumber to Kauai, where it was put into the building which was the residence of plaintiff and laborers on this land while cultivating the crop, being built for the purpose of making the crop.

The defendant admits this, but says that the boards were of but little value, and that he blamed the plaintiff for sending them at charge for the freight. But why should plaintiff have sent them and defendant have put them into his house if they were not partners, but employer and employee. The defendant testifies that he bought new lumber, but the value of it was less than \$50, and the whole house was of but little value, and plaintiff contributed a considerable portion at least towards it.

Considering these two acts in connection with the visit to Honolulu as proving a partnership formed, acts done in pursuance thereof, when did the parties agree that the partnership ceased and another relation commenced?

Several witnesses testify to hearing and taking part in conversations with the parties, wherein they agreed to become partners. Against these the defendant produces witnesses who testify to hearing an agreement for labor at \$15 per month and found.

I give quite as much credit to the former as the latter, but determine the case upon the acts and circumstances.

A book of accounts is produced.

It is evidently the property of the plaintiff, for the first part of it is filled with Japanese writing. The accounts relating to this business were kept in a rude way by defendant. Why does plaintiff furnish the book for defendant if he were defendant's hired man?

The accounts are the reckoning with the laborers, beginning at page 156 (as I have restored the paging where the corners have been cut out by the Japanese plaintiff to suit his purpose of marginal reference). In the handwriting of defendant the heading is:

Buki Hoohui i na la hana (a) kanaka (o) J. W. Puni (a me) Kupe Jap.

This in broken native, as the latter was. I translate it thus: "Partnership book of the working days of laborers of J. W. Puni and Jupe Japanese."

The first entry on this page is October 5th, 1878, and the last is April 5th, 1879.

The accounts of the different laborers, each on a page, are continued in the handwriting of the defendant, with the caption of the two names Puni and Jube, to page 173, except pages 170 and 171.

Beyond page 174 the pages are headed by Puni's name alone. The first entry being dated February 5th, 1880. Some entries under Puni and Jube are to December, 1879. See page 173.

On page 173 there is some account of figures and dates, but without explanation, with Jube's name at the top, but without an upper caption as all the laborers have.

This may be an account of money drawn by plaintiff. The dates, the 5th of the month, correspond with the dates in the other accounts, from which it appears that they drew money and paid the hands on the 5th of every month. The amounts are small, not the wages of \$15 per month.

The defendant charges, in testimony, that the plaintiff borrowed the book and cut out the leaves containing his own account. There are leaves cut out between page 330 and page 337; that is, in the back part of the book, and very far separated from the neighborhood where the other accounts of these parties are kept. The plaintiff denies cutting them, and says that they were cut out by the defendant to obtain blank paper.

I adopt the latter view. I do not think it probable that the plaintiff would cut out his account, for by any showing he has not drawn what would be his share in the partnership.

The book therefore, in my view, strongly supports the theory of a partnership.

DEALINGS WITH THE KOLOA SUGAR COMPANY.

Mr. Wright, the manager and president of the Koloa Sugar Plantation and Company, and Mr. Kahlbaum, the book-keeper and cashier, had their dealings only with the defendant. They

knew that the plaintiff was the luna, the working manager. He brought the pay-lists stating the amount of wages and the money required. Wright and Kahlbaum would pay nothing without Puni's order. This merely shows their knowledge or want of knowledge of the business relation which might subsist between Puni and Jubey, but it does not negative the fact of partnership. It is consistent with all the circumstances of this case that they should know Puni as the responsible man in this case, and know little of Jubey.

Puni was in their employment; an old resident in Koloa, standing very high in estimation, as Mr. Wright testifies. Jubey, a Japanese, speaking but little Hawaiian and less English, and a new comer. In the arrangement between them, Puni undertook the financial part of the speculation, and it was not necessary that Jubey should be known as a partner and do financial business. And yet both Wright and Kahlbaum seemed to have some apprehension that Jubey was more than an employee. Jubey told Mr. Kahlbaum he was a half-partner, in presence of Mr. Wright. So far as Puni denied this to them is of no consequence to this case. He now denies it. It is anticipating my conclusion, but I will say here that I think Puni wished and designed it to appear to Wright and others that this was his sole enterprise, and that Jubey was no partner.

Jubey made some claim on Wright and Kahlbaum as a partner, for a share of the proceeds, as they told him to be present at the settlement they were going to make with Puni for the first crop. He did not attend at that hour, but two days after. But having left the business of dealing with Wright and Kahlbaum to Puni, he may have left him to settle this account of proceeds. Jubey's account was with Puni, not the Koloa Company. Wright and Kahlbaum could not prejudice Jubey's interest by paying the net balance to the partner Puni. Jubey could have made no claim of partnership before Wright and Kahlbaum which they could settle.

I do not think that by not appearing at the hour set by the

plantation for settlement, Jubey disclaimed or waived partnership.

Four of the lists for monthly wages are exhibited, in which Jubey puts himself down for \$20, \$15, \$15, \$30 and pair of shoes \$6—\$36.

It is argued from these and from the facts in testimony, that Puni had his wages of \$50 per month credited on the account of advance on this canefield, that Jubey was a paid manager of Puni's field. Not conclusively, and against the evidence we have been considering, one partner may need to draw more for current private expenses, than another who may have other resources. In my view Puni was the chief capitalist, as Jubey was the working manager of the partnership. Jubey may have secured \$15 per month certain for his labor, if the speculation should not afford him any more. Differences in their private drafts can be adjusted in the settlement of partnership accounts.

When the first crop was off, defendant paid plaintiff \$150. He says it was a gift. He also says that in the engagement with plaintiff at \$15 and food per month, he told him that if he wanted \$20 per month he would give it to him, but that he continued at \$15 per month.

Now it may be that defendant made a present of \$150 (Mr. Kahlbaum says he asked for an order for \$250 for that purpose) to the plaintiff. And it may be that plaintiff labored at a monthly stipend of \$15, when he could have had \$20 by asking for it, and labored so zealously that it was remarked upon by Wright and Kahlbaum, but my inference is that he drew the lesser sums that he might have more to his credit from the crop, and that the defendant made him the "present" of \$150 in hopes that he might accept it as his share of the proceeds. The earnest assurance in the letter above cited, that he had been fair in some former enterprise of this kind and had not cheated his partner, and the effort to remove some anger on the part of the plaintiff, gives me an impression that Puni felt that Jubey had some reason to be suspicious of his fair dealing. There are indications in this case of deceitful dealing. Puni is the more

intelligent and experienced man; Jubey at some disadvantages of ignorance of language and in experience.

I have little to say about the dealings with the ratoon crop. Jubey labored on it for six months. It did not need irrigating. It grew very well; Mr. Wright says it has brought more than he expected. It does not appear that Jubey neglected his business, but he may have had reason to distrust his partner by that time, that he looked out for something else to do. He does not abandon his claim to proceeds, and now comes into Court when he finds that Puni has hypothecated them.

If he is found to be a partner for the plant cane, it follows that he is a partner for the ratoon crop on which he labored.

Thus I find a partnership, and it is ordered that both parties hereto make their accounts before D. K. Fyfe, Esq., Deputy Clerk, with reference to the Court for confirmation and final decree, the injunction to remain in force pending such proceedings.

Appeal noted.

F. M. Hatch, for plaintiff.

W. O. Smith, for defendant.

Honolulu, November 6th, 1882.

H. RIEMENSCHNEIDER *vs.* C. B. WILSON, Superintendent of Water Works.

MANDAMUS. BEFORE JUDD, C.J.

NOVEMBER, 1882.

The Government having assumed control of the Honolulu Water Works, mandamus will lie against the Superintendent of Water Works for a plain violation of his duty.

The Government may make reasonable rules and regulations in respect to the use of water from its pipes: and may deprive a party, transgressing the rules, of his water privilege.

It appearing that petitioner has violated reasonable regulations as to use of water, on account of which his water supply has been cut off, the Court declines to issue a writ to compel the water privilege to be restored to him.

DECISION OF JUDD, C.J.

This is a petition for a mandamus to command the respondent to turn on the water from the Government pipes to the petitioner's premises.

The petitioner alleges that he is in possession of a premises on Emma street, Honolulu, being a private residence, the grounds planted with a variety of trees and plants, and that he has had and enjoyed a water privilege therefor from the Government pipes for domestic and irrigating purposes, furnished him at \$25 per year, which said privilege has never been modified or limited by the consent of the petitioner. That he has paid to the respondent the full rate for the six months ending on the first day of January, 1883, and claims that he is thereby entitled to the water for this term. The receipt is annexed to the petition. The petition further alleges that on the 18th of October the respondent shut off the water from the premises, and refuses to turn it on again, whereby he is deprived of the use of the water to which he is entitled, and is put to inconvenience and exposed to irreparable damage from the loss of his trees; also, that it is the duty of the respondent, as Superintendent of Water Works, to furnish the water as claimed of which he has deprived the petitioner without right, and that the act complained of was a neglect of respondent's duty as Superintendent of Water Works; also, that petitioner has no specific remedy in the premises, or, if there are other means of relief, the slowness of ordinary legal forms would produce long delay in obtaining relief.

It is submitted in evidence that the Superintendent of Water Works has, with the approval of the Minister of Interior, issued certain regulations as to the water supply of Honolulu. The first one submitted bears date 1st January, 1876, and limits the hours of irrigation to the hours from 6 to 8 A.M., and from 4 to 6 P.M.

By Section 5, a rate of \$25 per annum is charged for a private house and lot of not more than half an acre, where water is used for irrigation as well as for domestic purposes.

By Section 12, it is provided that any person found running water for irrigation purposes after the hours above specified, will forfeit the unexpired term of his water privilege; and by Section 13, in case of fire, irrigation and fountain privileges are to be shut off under penalty of losing their privilege.

A notice of 19th April, 1881, limiting the hours as above set forth, was also shown. Probably this republication was deemed necessary, as the rule may have fallen into disuse.

Next is offered a rule dated 23d June, 1882, limiting irrigation after that date to four hours per day—from 6 to 8 A.M., from 4 to 6 in the P.M.—and “permission to irrigate during more convenient hours will be granted on application to the superintendent.” Persons found irrigating except during specified hours will have their privileges suspended without notice.

The next notice is dated 13th October, and suspends all irrigating privileges until further notice, owing to scarcity of water. It was while this notice was standing that the respondent shut off petitioner's water privilege on the 18th October, for on the 21st a notice appears limiting irrigation to between 6 and 7 A.M., and again on the 24th, a notice limiting the hours from 6 to 8 A.M., and from 4 to 6 P.M. Later rules in conflict with former ones operate a repeal of former ones.

It is agreed that the notice of October 13th, forbidding all irrigation, has no binding force, as not having received the approval of the Minister of Interior.

There is on the back of the receipt for the water rate these words: “The within receipt for water rates is given with the full understanding that the party holding the receipt will conform to the rules and regulations issued from time to time, by order of the Minister of the Interior. Neglect of such regulations will subject the ratepayer to forfeiture of water privileges.”

The petitioner's counsel contends that having paid his water rate, the receipt is a contract which binds the Government to furnish him an adequate supply of water for term of six months, and that the notice on the back of the receipt, it not being

shown that petitioner's attention was called to it and his consent obtained, is no part of it, and therefore the Superintendent of Water Works has no right to curtail petitioner's privilege in the least. Also, that the proviso on the back of the receipt is void for indefiniteness, and that there is no power given by the Legislature to make rules, etc.

The circumstances in brief are these: The petitioner, knowing the regulation limiting the hours of irrigation to from 6 to 8 A.M., and from 4 to 6 P.M., has generally conformed to them, but during many days after 1st July he has not had a servant employed in attending to his garden, and so has irrigated himself after the designated hours. For ten days previous to the 18th October, but little or no water flowed through his tap during the hours from 6 to 8 A.M. and from 4 to 6 P.M., and as his plants were drooping, he irrigated at noon and at such other times in which there was water in the pipes. On one occasion his tap was left open and the water flowed all night. The petitioner says this was unintentional on his part.

The respondent says that during the ten days previous to October 18th the water was low in the lower reservoir, and that he could only fill it from the upper reservoir at such hours as rate-payers from the upper reservoir were not using it, as the velocity of the water discharging from it prevented their taps from running. Moreover, he could not fill the lower reservoir nights because it interfered with the gas machines run by the water from the upper reservoir, and he had the further difficulty in drawing off the water from the upper reservoir, as certain persons having kalo patches and lands between the two reservoirs, which had the privilege of riparian proprietors from the stream which supplies both reservoirs, would become short of water, unless the overflow from the upper reservoir was allowed to pass back into the stream for their benefit.

Water is a public necessity, and especially in our climate.

I am of opinion that the Government, having assumed the enterprise of supplying the town of Honolulu with water, and having secured by various acts of the Legislature the right to

condemn the necessary land and water for the purpose of a system of water works, which prevents private parties from engaging in this business, it has taken upon itself a certain duty towards the inhabitants of the town. This is, to make available all the water that is reasonably required and that can reasonably be secured, and to distribute the same as equitably as possible to all ratepayers. I think it would not be proper for the Government to extend indefinitely the number of distributing taps to new applicants without correspondingly increasing its supply. But there is no proof that it has done so.

But the public, receiving the advantages of this water supply from the Government, owe certain reciprocal duties to it, which are to pay the rates as long as they are reasonable, and to obey such rules and regulations as may be made for the public convenience and protection, provided they are reasonable.

The obligation of the Government to the individual rateholder is not alone made by the contract expressed in the receipt for water rates for six months in advance. If this was so, then a fulfilment of it could not be enforced by *mandamus*. If this proceeding is merely to compel the fulfilment of a contract, then the writ would not lie.

The remedy for breach of contract is at law. But, as in my opinion, the Government has assumed an obligation in this respect, it can be enforced if the refusal to do so is a plain violation of duty on the part of the official. See Section 5 of the Law of *Mandamus*, Acts of 1876, Chap. 39.

I have indicated that the Government has a right to make reasonable rules and regulations in respect to the water works and the supply of water to the inhabitants.

The exercise of this authority is necessary for the public benefit, and in order to enable the Government properly to fulfil its obligations to all the community in distributing the water as fairly as may be possible. In times of water famine all must suffer reduction alike, and the Government has then the right to restrict the use of the water by ratepayers, commencing the reduction with the least necessary use of water, *i.e.*, irrigation.

At the same time every reasonable exertion must be put forth to secure a full supply of water.

I regard the limitation of irrigation privileges to four hours per day, between 6 and 8 A.M., and between 4 and 6 P.M., as reasonable and as ordinarily sufficient, and it is an accommodation to the public that they may arrange with the superintendent for irrigation during other hours when these prove inconvenient, either from scarcity of water in some localities or from whatever cause.

Having found that the Government may make reasonable regulations and restrictions upon the use of water from its pipes, how can it compel obedience to them? Not by the imposition of a money penalty, for this would imply the right to enforce this by imprisonment, which would be illegal without trial by a Court, and, in the absence of a statute, giving the Superintendent of Water Works or Minister of Interior the power to inflict fines, the only way these rules can be enforced is by a deprivation of the offending party of his water privilege. If the transgression was in irrigating outside of the prescribed hours, I should say irrigation privileges should alone be suspended, if it was possible to separate them from domestic uses. But ordinarily it is not possible to do this.

The regulation of 13th October, suspending all privileges of irrigation, I do not think was reasonable or justified under the circumstances. There had been no drouth of sufficient long continuance to make this a necessity. If the petitioner had only transgressed this rule and had used only sufficient water to keep his plants alive, his case would be different. He had a right, moreover, to disregard this last edict, because it did not appear to have been approved by the Minister of Interior. But the Attorney-General does not contend that this rule was valid and binding. If the petitioner found that it was impossible for him to get water for irrigation during the prescribed hours, it was his duty to apply to the respondent for a change in his hours.

I do not think that an unintentional, and only an exceptional

case of neglect to close a tap and thus let water run to waste all night, should subject a person to have his privilege summarily cut off.

But as I have suggested, if the petitioner had violated no rule except the invalid one suspending all irrigation, and had used only a small quantity of water to keep his plants from dying, I would not hesitate to grant the prayer of his petition and order a restitution of his water privilege, but he admits that he has for months past disregarded the rule of June 23d and irrigated his garden at hours which suited his convenience, and he contends by his counsel that he is not bound to observe any regulation restricting him in the use of the water. As all these violations are brought into the case against him, I must presume it was for these that his water-pipe connecting with the Government main was closed by respondent.

The Attorney-General, for the respondent, offers to restore the privilege on the petitioner agreeing to conform to the published regulations. This is a reasonable offer in my opinion.

Having found that the petitioner has violated the regulations made by the Government in the interest of the public welfare, and that they are reasonable, I must decline to grant the writ prayed for.

S. B. Dole, for petitioner.

Attorney-General Preston, for respondent.

Honolulu, November 7th, 1882.

MANU *et al.* vs. NEIL CAMPBELL *et al.*

IN EQUITY. BEFORE JUDD, C.J.

DECEMBER, 1882.

The Court declines to declare a deed, absolute in form and of record for fifteen years, to be a trust-deed; there being no fraud by the grantee and no proof of mutual mistake.

DECISION OF JUDD, C.J.

This is a bill in equity by Manu and Kaohua his wife, Naihe and Uilani his wife, Kala and Emalia the 2d his wife, Zobedaio the 1st and Kaanaana his wife, and Zobedaio the 2d, a minor by his next friend Manu, all of Kohala, against Neil Campbell and Emalia the 1st, his wife, and Kaua, Ana and Kamaka the 2d, minor children of the said Emalia the 1st and Kamaka the 1st, lately deceased, also of Kohala.

The substantial facts are these: One Inaina, the owner of a piece of land at Waiapuka, Kohala, Hawaii, twelve acres in extent, held by him under Royal Patent 4719, made a deed of it to his nephew Kamaka the first, dated the 3d of February, 1866, and acknowledged it the same day before Mr. Naiapaakai, then Circuit Judge. Immediately on his return to his house, some miles away from the place of execution, he told the judge who had accompanied him hither that he meant this land to go to the children of his sister, some of whom were present at his house on the land living with him, and whom he brought up. When asked how he came to make a deed that morning to Kamaka, he said that he wished to make a disposition of his property lest Kehuanaoa, who was some relation of his, should get it, and that he had made the deed at his (Kamaka's) request, but that it was not according to his own wish. Mr. Naiapaakai said he was not prepared with writing materials there, and Inaina said nothing further. Kamaka was not present when the above conversation took place between Inaina and Naiapaakai.

This land was then being cultivated by the family—the “Kaikamahines” or nieces of Inaina and their husbands, and each had a piece allotted to her. These persons are called “daughters” in some of the testimony, owing to the Hawaiian word being the same for daughter and niece, but Naiapaakai says they were daughters of Inaina’s sister, and hence his nieces. Mahoe says also that Kamaka was the son of Inaina’s sister.

Inaina died in 1876, having been in ill-health for some years. Shortly before Inaina’s death he said that each “Keiki” (or child) was to live on the portion of land allotted to her.

Kamaka had been away on a whaling voyage, but had returned and was present and made no reply to these declarations of Inaina, and afterwards cultivated his allotted portion and did not interfere with the possession of the other children so long as he lived, but, as the head of the family after Inaina’s death, settled disputes between them. D. B. Mahoe says that in 1875 or 1876, Kamaka told him that Inaina had deeded the land to him and out of good feeling for his sisters he had divided the land with them, and he pointed out to Mr. Mahoe the different portions set apart.

In 1874 Kamaka mortgaged the entire estate to Mr. Atkins, which is still unreleased in record. He died in 1879.

Do the above recited facts reveal a state of things upon which the Court would be authorized to declare that the conveyance to Kamaka, though absolute in form, is affected by a trust for himself and his sisters, the heirs of deceased’s sister?

No fraud is alleged or proven on the part of Kamaka. But it is urged that the acts of both Inaina and Kamaka indicate that the deed was intended to be to Kamaka in trust for all the heirs, and that the conveyance was made to Kamaka alone by mutual mistake of the parties. Is there a mutual mistake shown? Inaina certainly was informed that the deed he had that day made did not express his intentions, but he made no effort to correct it. He labored under the mistake only part of a day. The declarations made by him shortly before his death had no

legal effect to change the disposition of his property already made, and his request in presence of Kamaka that the children should continue to live on their allotted portions of the land is not inconsistent with the deed made, according to the Hawaiian mode of life, where it is extremely common for them to cultivate and build houses on land in which they have no title, simply at the sufferance of the legal owner. Moreover, it seems to me that Kamaka did acquiesce in Inaina's request, and the nieces (keikis) were not disturbed in their occupation as long as he lived, but this affords no proof that he took the deed under a mistake as to its contents, for he exercised ownership over it by executing a mortgage of it all.

I have not discussed the law as to whether a trust can be created by parol, having come to the conclusion after mature deliberation that none is here shown, for I can find no evidence that Kamaka took the deed under the belief that it was intended to convey the land to the nieces of Inaina, as well as to himself, and there is no proof that Inaina's intention was ever brought home to Kamaka except inferentially from the remarks made by Inaina shortly before his death. This evidence is too slight upon which to change the legal effect of an instrument which has been fifteen years of record. Bill dismissed.

A. S. Hartwell, for plaintiffs.

E. Preston & C. Brown, for defendants.

Honolulu, December 1st, 1882.

HEEIA SUGAR PLANTATION COMPANY *vs.* KAHANA-MOKU *et al.*

INTERMEDIARY COURT. BEFORE JUDD, C.J.

JANUARY, 1883.

A foreign corporation, that has failed to comply with our laws as to registration, held not entitled to bring a suit against contract laborers for refusal of duty.

DECISION OF JUDD, C.J., ON APPEAL FROM DISTRICT JUSTICE OF KOOLAUPOKO.

The defendants are laborers contracted to work for John McKeague and John McKeague & Co., and have refused to work for the plaintiffs on the ground that the plaintiffs are not the parties with whom defendants contracted.

Among the papers introduced in evidence is a deed of conveyance dated 30th June, 1882, whereby John McKeague sold to the Heeia Sugar Plantation Company, a corporation "organized and existing under the laws of the State of California, U. S. A., and carrying on business at Heeia, Koolaupoko, Island of Oahu," all the property comprising the Heeia Plantation, in consideration of the sum of one dollar, and for other good and valuable considerations, which Mr. McKeague says was the issuance to him of 40,000 shares of the stock of the corporation.

The plaintiffs, then, are a foreign corporation carrying on business in this Kingdom.

Section 1 of Chap. XI of the laws of 1878, entitled "An Act Providing for the Service of Process on Foreign Corporations," requires that there shall be filed in the Department of the Interior within twenty days after commencing to do business in this Kingdom, a designation of some person residing in the principal place of business of the corporation in this Kingdom, upon whom process by authority of or under any law of this Kingdom may be served; and in Section 2 of this act it is

provided that every corporation failing to comply with the provisions of the first section "shall be denied the benefit of the laws of this Kingdom." The plaintiffs have not complied with this law.

In my opinion this 2d section debars the plaintiff from the right to bring an action in the Courts of this Kingdom in its corporate capacity. It would be manifestly unjust to allow a corporation, which has no legal existence under our laws and which has not designated any person to represent it, upon whom service of process can be validly made, to bring suits, and the statute is clear and explicit that a corporation in such case shall be denied the benefit of the laws of this Kingdom.

The King alone has this immunity in this Kingdom.

The plaintiffs, therefore, cannot maintain these actions and are nonsuited.

J. M. Davidson, for plaintiffs.

F. M. Hatch, for defendants.

Honolulu, January 3d, 1883.

In re NEI KAMARAWA.

HABEAS CORPUS. BEFORE JUDD, C.J.

JANUARY, 1883.

In the absence of an adoption in writing, held, that parents who gave their child to other parties, had not parted with their right of custody of the child.

But it appearing that the child was unwilling to go back to her parents: that it would not be to her advantage to do so: and that she had reached an age where she was capable of exercising a sound discretion: the Court declines to order her to the custody of her parents.

DECISION OF JUDD, C.J.

It appears that in December, 1879, on the arrival of a number of Gilbert Islanders to the Board of Immigration, a married couple among them, Ti Tau and Toaua, from Apaiang, gave

their daughter to a Hawaiian woman, Kealoha, and her husband, Makanui. The Gilbert Islanders understood that they were binding their child for three years, or until their indenture of labor here should expire, and it was so interpreted to them by a Hawaiian named Kaikala who had learned the language.

The Hawaiian foster-parents understood that the child was given to them absolutely. The Secretary of the Board of Immigration so understood the bargain, and had it so interpreted to the people through a Mr. Holland, who is not now in this Kingdom, and cannot give his evidence.

The parents left soon after for a residence on the Kilauea Plantation, on Kauai, and only returned to Honolulu a week ago. On going to where their child was, they found that the Hawaiian foster-parents would not surrender her, and also that the child was unwilling to go back to them. The Hawaiians demanded to be paid back \$300 as their expenses for maintaining the child during these three years. The father, Ti Tau, then applied to this Court for a writ of *habeas corpus*, and the child was produced in Court and a hearing was had. The child appears to have been well cared for, clothed and educated by her foster-parents, is happy with them, speaks the Hawaiian language fluently, and assumed to have forgotten her native tongue, but it was evident that she still understood it. Her long residence with her foster-parents, having had no communication with her own parents meanwhile, has caused the child's affections to be thoroughly alienated from her parents, who, however, profess strong love for their child, which is apparently sincere, and are very desirous that she return with them to their native land.

It is the custom among the Gilbert Islanders to lend their children to friends, but not to give them by adoption of other parents, and on marriage, however young, the parents cease to have control over their daughter. No articles of adoption were made in this case.

I am clear that in the absence of an adoption in writing according to our law, the parents have not parted with their right of custody over their child.

Should I then grant the writ and remand the child to the custody of her parents to be taken back to the Gilbert Islands?

Chancellor Kent says: "The father may obtain the custody of his children by the writ of *habeas corpus* when they are improperly detained from him; but the Courts, both of law and equity, will investigate the circumstances, and according to sound discretion, and will not always and of course interfere upon *habeas corpus* and take a child, though under fourteen years of age, from the possession of a third person and deliver it over to the father against the will of the child." They will consult the inclination of an infant, if it be of sufficiently mature age to judge for itself, and even control the right of the father to the possession and education of his child, when the nature of the case appears to warrant it. 2 Kent's Com., 194.

It is a general principle also, that the Court is not bound to deliver the child into the custody of a claimant, or of any other person, but may leave it in such custody as the welfare of the child at the time appears to require; and in all cases if the child has arrived at the age of discretion, it will be permitted to elect in whose custody it will remain, provided its choice, under the circumstances, does not, in the opinion of the Court, lead to improper custody. Hurd, *Habeas Corpus*, p. 461.

It has been well said that the "welfare of the infant is the polar star by which the discretion of the Court is to be guided." *Ibid.* 632.

When the parent has voluntarily parted with the custody and seeks to recover it, if his right to recover it be doubtful or the assertion of the claim would be inequitable to others or injurious to the child, or if no legal right to the custody be preferred by anyone, the reasonable wishes of the child should be allowed a controlling influence. *Ibid.* 533.

In *Rex vs. Delaval*, 3 Burr., 1436, Lord Mansfield said: "The Court is bound *ex debito justitiæ* to set the infants free from an improper restraint, but they are not bound to deliver them over to anybody or give them any privilege."

The Court must judge for itself as to whether the child is

capable of exercising a sound discretion, and there is no arbitrary and fixed age at which a child's inclination is to be consulted, and I find that infants have been allowed to exercise their discretion from nine years old and upwards. Chief Justice Shaw said, in *Pool vs. Gott*, 14 Law Reports, 269: "There is no doubt that the father is *prima facie* entitled to the custody of his child. But this is not an absolute right. It may be controlled by other considerations. If unable or unfit to take charge of the child and educate it in a suitable manner, the Court will not interfere to take the child from the care of persons who are fit and able to maintain and educate it properly."

This was a case in which the child was a girl of thirteen years, and the Court declined to order her from the custody of her grand-parents, with whom she had been living nearly all her life, to that of her own father, though in a good situation, pecuniary, domestic and social, and of good character, on the ground that he had permitted, by his acquiescence in the child's long residence away from him, the affections on both sides to be engaged, and a state of things to arise which could not be altered without risking the happiness and interest of the child.

This case bears so close an analogy to the one at bar and is from so high an authority, that I regard it as conclusive.

I am of opinion that the infant in this case has reached the age when she is capable of exercising a sound discretion, and she has shown a strong desire not to return to the Gilbert Islands. Therefore, to compel her to do so would be at the risk of her happiness, and it is manifestly not to her advantage to do so.

I therefore decline to order her to the custody of her father. She may go free.

W. R. Castle, for petitioner.

Honolulu, January 10th, 1883.

PAULO *vs.* D. MALO.

EJECTMENT. BEFORE AUSTIN, J.

MAY, 1883.

Adverse possession held to be proven by cultivation of the land and payment of taxes: and the fact that defendant took out a Royal Patent for the land, in the name of plaintiff, held not to be an admission of plaintiff's title.

DECISION OF AUSTIN, J.

The plaintiff in ejectment established presumptive title as heir to the patentee Kea.

The defense has claimed title by adverse possession.

The plaintiff attacks first the character of the possession itself. He says it was not continuous or complete, and is for that reason insufficient.

To determine this point, the amount and nature of the land are to be considered. It consists of two and 45-100ths acres, mainly taro patches. There is a small part of it not adapted or used for kalo culture. The land was not fenced till lately. At one time a grass house was built on the land which was occupied by defendant and his father and his aunt, under whom he claims. This house was pulled down, but the proof establishes, I think, a substantial continuous cultivation of the taro land and occasional cultivation of the other land for potatoes.

The whole land is small. Only scraps of it, from time to time, were left idle. I think it may be found that the land was usually cultivated or improved. This is sufficient as to the kind of possession.

See Washburn on Real Property, Vol. 3, 140-1-9-150.

The defendant and those under whom he claims paid taxes on the land for over twenty years. The character of their acts and possession may be taken as notice to the owners of a claim

of title. Express notice is not necessary to be shown. See authorities last cited.

The defendant's aunt Kahawalu, under whom defendant claims as her remote heir through his father Kalama, died in 1871; whatever rights she then had descended to her brother Kalama. Her husband, Hoohoku, took no interest from her under the then statute. Kalama retained the possession and transmitted it to the defendant; privity is shown by him with Kalama and with Kahawalu.

I therefore think that title by adverse possession is made out by the defendant, unless other facts shown, to which I shall now refer, establish that the possession was not adverse, but in subserviency to the title of the plaintiff.

Kea, the patentee, died in 1849, in possession of the land in dispute and having been in possession since 1839. It was declared to have been his land on February 3d, 1848.

Kahawalu, widow of Kea, held possession after his death till some time in 1854. We have held that she had no right to the possession as widow. What was her intention in so holding possession may be inferred by her subsequent acts.

In 1854 she and her brother Kalama made application before the Land Commission, and the land was awarded to Kea by name, and his heirs. Subsequently, in 1856, Kahawalu obtained in the name of Kea a Royal Patent running to Kea and his heirs. This she received and kept. It remained in her possession till her death and was transmitted to her heir Kalama, who held it till 1877 when defendant claims it was taken away by some party in plaintiff's interest.

The plaintiff's counsel earnestly claims that these facts show a subserviency to the title of the heirs, and dispute all claims to hold the land adversely.

Upon the first trial of this case I was inclined to so decide. But further examination and reflection have led me to modify my opinion.

In order to establish any valid title to the land, the statute of 1845 provides that it was necessary that an award should be made; that otherwise the land would escheat.

By applying for the award to Kea in 1854, Kahawalu did not intend to acknowledge the title of the plaintiff or his ancestors. That application was not made for their benefit, but for her own, and to prevent the escheat of the land. It was in effect a claim that she was entitled to the property as heir, and that there were no other heirs. The heirs did not appear before the Land Commission, nor was any proof made before it of their existence.

Had the matter rested with them, the statute Sec. 8, p. 109, Laws of 1845, declares that all their claim to this land would have been forever barred. The first time the heirs of Kea, under whom the plaintiff claims, made known their claim was in 1872, twenty-four years after the death of Kea. Kahawalu, it would seem, though erroneously, relied on the Royal Patent as a muniment of her title. Its possession by her under the circumstances cannot be taken as an admission of the plaintiff's title. But for the Statute of 1845, the possession taken by Kahawalu in 1848 would have ripened into a title before her death in 1871. By procuring the Award and Royal Patent as stated, she did not take away all chance of her maturing a title to the land. The statute is peculiar to this country, and no similar question could arise in England or in the United States.

I hold that the defense of the Statute of Limitations is made out, and direct that judgment be entered in favor of the defendant with costs.

W. R. Castle, for plaintiff.

R. F. Bickerton, for defendant.

Honolulu, May 1st, 1883.

HAWAIIAN BELL TELEPHONE CO. *vs.* ORIENTAL
TELEPHONE CO.

IN EQUITY. BEFORE JUDD, C.J.

MAY, 1883.

Where a fraud is charged to have been committed against a corporation in regard to allotment of shares, the corporation, and not aggrieved shareholders, is the proper party plaintiff.

It appearing that certain shares, held by defendant, were not obtained without consideration or by fraudulent misrepresentations, the Court declines to order them delivered up for cancellation.

DECISION OF JUDD, C.J.

The following abstract of the bill and answer I have taken from the brief of defendant's counsel.

1. That June 14, 1881, 505 shares of the stock of the Hawaiian Bell Telephone Co. were issued in the name of the Oriental Telephone Co. (Limited) of London, the certificates of said shares being signed by S. G. Wilder, then vice-president, and C. O. Berger, secretary of the said Hawaiian Bell Telephone Co., and being now in the possession of the defendant E. P. Adams, as agent of the Oriental Telephone Co. This averment is admitted in the answer.

2. That 55 of said shares were paid for, and 450 of them were issued wholly without consideration and by fraud on the part of the said Oriental Telephone Co. The answer denies this averment.

3. That in February, 1880, a list of subscribers had been obtained by said Berger for the purpose of forming a telephone company. (The answer neither admits nor denies this, but leaves it to be proved by the plaintiff.) That in October, 1880, before obtaining a charter of incorporation, the Oriental Bell Telephone Co. of Boston, through its agent Samuel Hubbard, represented to the individuals now forming the Hawaiian Bell Telephone Co.

that the said Oriental Bell Telephone Co. held patents upon the telephone instruments, and that none of said instruments could be manufactured, bought or used without the consent of said Oriental Bell Telephone Co., and that said (Oriental Bell) Telephone Co. had the sole and exclusive right to dispose of the same, and that it would be impossible for a company to engage in the telephone business in Honolulu without the consent of said Oriental Bell Telephone Co. (The answer denies this allegation.) That after His Majesty in Privy Council had decided to grant a charter of incorporation to said Hawaiian Bell Telephone Co., said Hubbard, November 23, 1880, on behalf of said Oriental Bell Telephone Co., reiterated the statements above alleged as to the rights and powers of said Oriental Bell Telephone Co. at a meeting of the individuals who had petitioned for said charter, and to whom the same was afterwards granted. The answer denies this allegation.

4. That said Hubbard at said meeting offered that if 450 shares of the Hawaiian Bell Telephone Co. should be issued to the said Oriental Bell Telephone Co., it would grant to the Hawaiian Bell Telephone Co. the sole right to use telephone instruments in the Hawaiian Islands, and would furnish and supply telephone instruments to the Hawaiian Bell Telephone Co., and would make concessions to said Hawaiian Bell Telephone Co. of rights and privileges belonging to and exclusively possessed by said Oriental Bell Telephone Co., and would prevent all persons other than the Hawaiian Bell Telephone Co. from using in the Hawaiian Islands or importing therein any telephone instruments or apparatus. The answer denies information or belief of this averment.

5. That the Hawaiian Bell Telephone Co. believing said representations, and relying upon the ability of said Oriental Bell Telephone Co. to fulfil and make good all of the promises and undertakings made and assumed by them as above alleged, and in consideration that said Oriental Bell Telephone Co. could and would do so, agreed to issue to said Oriental Bell Telephone Co. 450 shares of the capital stock of said Hawaiian Bell Tele-

phone Co., and relying, etc., as above, etc., also erected lines of telephone wires in said Honolulu, and made large expenditures of money in so doing. The answer denies this averment.

6. That June 14, 1881, while H. A. Widemann, President of the Hawaiian Bell Telephone Co., was absent from this country, said E. P. Adams, acting agent of the Oriental Telephone Co., (Limited), persuaded and induced S. G. Wilder, at that time Vice-President of the Hawaiian Bell Telephone Co., to issue 450 shares of the capital stock of said Hawaiian Bell Telephone Co. That said S. G. Wilder was ignorant of the falsity of the representations made by said Oriental Bell Telephone Co. to the complainant, and caused such shares to be issued, believing said defendant was entitled to the same. That said E. P. Adams caused said stock to be issued in the name of the Oriental Telephone Co., (Limited), representing that said Oriental Bell Telephone Co. had become merged in said Oriental Telephone Co., and that the latter had full knowledge of the representations made by said Oriental Bell Telephone Co. to the company complainant, and had assumed all the obligations and understandings above set forth and made to the company complainant by the Oriental Bell Telephone Co. The answer denies the above averments, and avers that Wilder caused said 505 shares to be issued to said Oriental Telephone Co., (Limited), believing the latter company to be entitled to the same, and not by reason of any false representations or any representations of whose truth or falsity he was ignorant, and admits that Adams caused said stock to be issued in the name of the Oriental Telephone Co., (Limited), representing that said Oriental Bell Telephone Co. had become merged in said Oriental Telephone Co., (Limited), but denies that he represented that the latter company had full knowledge or any knowledge of the representations made as in said bill of complaint alleged by said Oriental Bell Telephone Co. to the company complainant, or had assumed the obligations and undertakings in said bill of complaint set forth.

7. That on or about January, 1882, the company complainant

discovered that the representations made to it by said Oriental Bell Telephone Co. were wholly false; that said Oriental Bell Telephone Co. had no exclusive rights nor any rights in regards to the telephone in the Hawaiian Islands; that the concessions granted by said company to the company complainant were wholly illusory and fraudulent, and that telephone instruments manufactured in the United States were imported into this country and sold openly to any person desiring to purchase the same; that said Oriental Telephone Co., Limited, when called upon by the company complainant to protect them in their exclusive rights to use and sell telephones in the Hawaiian islands, acknowledged that it was unable to do so. The answer denies this averment specifically.

8. That said Berger, the said secretary, was unwilling to issue said shares in the name of the Oriental Telephone Co., as he had no authoritative notice of any transfer of said shares by said Oriental Bell Telephone Co., and he signed said certificate only upon the express direction of said vice-president upon the threat of being removed from his office if he refused to do so. The answer denies this averment, and avers that Berger delayed issue of 505 shares solely because of his claim that he was entitled to receive, in consideration of his having obtained said subscriptions, certain paid-up shares in the companies complainant and defendant, which shares he has since received as of the value of \$840.

9. That said Oriental Bell Telephone Co. and said Hubbard, at the time of making the representations and promises above set forth, well knew that the same were false, and that they were unable to fulfil or perform the same, and that said Oriental Telephone Co., at the time said shares were issued to it, well knew the promises and undertakings of said Oriental Bell Telephone Co. above alleged, and that the same could not be performed and that the same were false and fraudulent. That said E. P. Adams has been requested to surrender said certificates for cancellation so far as said 450 shares are concerned, and has been tendered a new certificate for said 55 shares, but he refuses

to surrender or receive the same. The answer admits said request to surrender, but denies said tender, and denies the other averments.

The bill prays for process, that defendant be ordered to deliver said 450 shares for cancellation, and that said Adams be enjoined from disposing of said certificate of shares, for costs and general relief.

The answer further avers that the promises alleged in the bill to have been made by said Hubbard were beyond his power to make, and if made were not binding at law or in equity upon the company defendant; that the company complainant hath no right or cause of action against these defendants by reason of anything contained in said bill; also, that the promoters of the company complainant well knew all the power and authority of said Hubbard in the premises, and that he neither could bind nor agree to bind the Oriental Bell Telephone Co. to the securing or granting to the company complainant the exclusive right to buy or sell telephone instruments in this Kingdom.

Also, that the agreement made by said Hubbard on behalf of said Oriental Bell Telephone Co. with the promoters of the company complainant, was that he should assist in the organization and establishing of said Hawaiian Bell Telephone Co. and in starting the same in its business in said Kingdom, in furnishing information and facilities in that behalf then available from no other source, and that much valuable plant, the property of said Oriental Bell Telephone Co., should be transferred to said Hawaiian Bell Telephone Co. to enable it to commence operations. That said Oriental Bell Telephone Co. would sell its Bell telephones to the said Hawaiian Bell Telephone Co., and that in consideration thereof the Oriental Bell Telephone Co. should have 505 paid-up shares in said Hawaiian Bell Telephone Co., all of which said agreement was faithfully kept and performed by said Hubbard; and that the plant so transferred to said Hawaiian Bell Telephone Co. was of the value and was by said company accepted as of the full value of \$1233, and further that the said Oriental Bell Telephone Co. expended in the forming of said Hawaiian Bell Telephone Co., in the expenses of the

said Hubbard in coming to this Kingdom and remaining here for the purpose aforesaid, the sum of and over \$1500, all of which was well known to the said Hawaiian Bell Telephone Co. and formed a full and legal consideration for the said stock so issued as aforesaid to the company defendant.

BY THE COURT.

Without detailing the evidence, which is quite lengthy, I consider the following to be the undisputed facts of this case. A number of gentlemen in Honolulu had agreed to form a company to establish a telephone system in this city. The promoter was C. O. Berger, with whom was associated a Mr. Thompson. These persons secured the agreement of a number of persons to have telephone stations at their houses, and another list of subscribers to take stock in the company to be formed. Mr. Berger corresponded with parties in California endeavoring to procure the necessary instruments, but was unsuccessful. Mr. Thompson was equally unsuccessful after personal efforts in San Francisco. Shortly before this the Oriental Bell Telephone Co. was formed in Boston, having secured from the American Bell Telephone Co. the right to sell and use the telephone apparatus of this company in Polynesia, Australia, China and India. This company learning that there was a prospect of establishing a telephone system in Honolulu, sent hither Samuel Hubbard as their agent. He arrived here October 4th, 1880, having brought with him considerable telephone apparatus and soon connected with Mr. Berger. At a meeting of the subscribers to the contemplated company, held November 23d, 1880, Mr. Hubbard read or showed a prospectus prepared by him in which the capital stock was put at \$10,000, divided into 1000 shares at the par value of \$10. The prospectus reads "Stock to be disposed of as follows:

"To Oriental Bell Telephone Co., for patent rights, concessions &c., valued at \$4500	450
"To Oriental Bell Telephone Co. Cash fully paid	60
"To subscribers remainder of shares at \$5 each, remaining \$5 sub- ject to calls as required	490
"Total.....	1,000

It will thus be seen that the Oriental Bell Telephone Co. secured a majority of the stock.

The subscribers proceeded to apply for a Charter of Incorporation, which was granted December 30th, 1880, and the company organized in due form, and have made a success of the business, having extended their system of exchanges beyond all expectations. The stock is now sought for at \$70 to \$75 per share. Mr. Hubbard left the islands December 21st, 1880, but before he left he had received intelligence that the Oriental Bell Telephone Co. had disposed of its property. It subsequently transpired that it had sold out to the Oriental Telephone Co. (Limited), of London, which company was incorporated under the laws of Great Britain on February 7th, 1881. There is in evidence a letter dated at the office of the Oriental Telephone Co. (Limited), London, May 18th, 1881, from "Samuel Hubbard, late special agent Oriental Telephone Co.," to H. A. Widemann, President of the Hawaiian Bell Telephone Co., requesting him to transfer the 505 shares standing in his name as trustee for the Oriental Bell Telephone Co. as follows: "505 shares to Oriental Telephone Co., (Limited), and five shares to Mr. Berger according to agreement." On the 9th June, 1881, during the absence abroad of H. A. Widemann, the President of the Hawaiian Bell Telephone Co., the secretary of the company, Mr. C. O. Berger, was requested by Mr. E. P. Adams (defendant), the agent of the Oriental Telephone Co. of London, to transfer the stock to this company. And it was accordingly done a few days later by the secretary at the instance of Mr. Wilder, the vice-president, and is now held by Mr. Adams. The secretary entered this allotment of stock in the stock-book of the corporation, as of January 6th, 1881, the date when the other shares were allotted to the subscribers. At a meeting of the company held September 11th, 1882, it was voted to charge the Oriental Telephone Co. with \$4500, being for 450 shares at its par value of \$10. Against this action Mr. Adams protested formally. This suit was commenced February 23d, 1883.

Objections are urged by the defendant's counsel that this bill

is improperly brought by the corporation, whereas it should have been brought by aggrieved shareholders. But in this case a fraud is charged as having been committed against the corporation, in procuring an allotment of shares to be made by illusory and fraudulent representations, and I think the corporation was the proper party to bring the bill.

The counsel for defendant also urges that as the power is not granted by the charter of the corporation of declaring forfeiture of shares, so the Court has no jurisdiction to declare a forfeiture. This may be good law but it does not apply, for the bill does not ask for a "forfeiture" of the shares; it prays that they may be delivered up for cancellation, as if they never had been allotted. I consider this a very different matter from the forfeiture of shares for non-payment of assessments.

I now pass to the consideration of the alleged false and illusory representations and promises of Mr. Hubbard to the Honolulu subscribers which, it is alleged, induced them to allow his company to take a majority of the paid-up stock. I think the apparent contradictions may be reconciled without imputing intentional falsehood to any one. It seems to me that Mr. Hubbard did use language from which it might be inferred that no telephone instruments could be bought or obtained in Honolulu, except through the Oriental Bell Telephone Co., but it cannot be doubted that he meant the "Bell Hand Telephone or Receiver," and the "Blake Transmitter," because these were the instruments controlled by this company, and he says that they then had bought up all the patent rights of other inventors in the United States. That he had in mind these instruments is evidenced by the name of the company to be formed here, as appears by his prospectus, *i.e.*, "The Hawaiian 'Bell' Telephone Co." Some of the witnesses say that he said "these instruments." He may have said "these instruments," meaning those he had brought with him, *i.e.*, the Bell Telephone and Blake Transmitter, and his hearers understood the word "telephone" to be used in its generic sense and to include all telephones of whatever pattern or invention. The consideration he

undertook to give for this stock in the prospectus was the "Patent Rights and concessions." This must mean such as were then held by the Oriental Bell Telephone Co. This Mr. Hubbard said was what he guaranteed. There is no proof before me that this engagement has been broken.

Some of the witnesses understood that Mr. Hubbard undertook to protect the Hawaiian Bell Telephone Co. from infringements in this Kingdom of the patents held by his company. This is not at all likely. It is not to be lightly presumed that a person would make an impossible undertaking. A slight enquiry would make it certain that unless these instruments were protected by Letters Patent in this country, imitations of them, equally efficient as those bearing the official stamp of the company, could be made abroad and imported here, or made in this country with complete impunity.

Every one is presumed to know the law, and I must presume that the Honolulu subscribers knew that Mr. Hubbard could not protect them against infringements in this country of the telephones his company controlled.

It is evidence that a few telephones of the Bell Patents were sold to residents here before the company plaintiff was organized; but none have been sold since, except through the company plaintiff. It is proven in evidence that Messrs. W. G. Irwin & Co. have imported 50 or 60 instruments, but I gather from the testimony of Cassidy and Hubbard that they were close imitations of the Bell Telephone and Blake Transmitter, but do not bear the official stamp and were not manufactured under the "Bell Patents." There was no evidence offered as to the source from which the Hilo Telephone Co. received its instruments.

It seems strange that the Honolulu subscribers were willing to part with a controlling proportion of the stock in the contemplated company for a consideration not evidenced by anything but oral, and therefore not definitely remembered, declarations, and an unsigned, pencil memorandum of a prospectus. On the other hand the company plaintiff does not seem to have voted,

since its incorporation, the stock to the company represented by Mr. Hubbard.

No evidence in the way of an assignment or otherwise is shown to have been presented to the company plaintiff to show that the Oriental Bell Telephone Co. had sold out its property and rights to, or had become merged in, the Oriental Telephone Co., (Limited). A copy of the charter of the latter company exhibited in Court, shows that it was not incorporated until February 7th, 1881. But the stock was allotted, and the certificates therefore have been passed to this company and are now held by its agent, Mr. Adams. This transfer was made to the London Co. apparently on the letter above referred to, dated 18th May, 1881, of Mr. Hubbard to Mr. Widemann, as President of the Honolulu Co., advising him to transfer the stock to the new company.

I did not regard it as proved that this was accomplished by false representations and threats to remove the secretary from office. It is shown that the defendant company did not control a sufficient amount of stock to do this, and I think Mr. Berger must have been mistaken, or he deduced this from Mr. Adams' letter to Mr. Berger of June 9th, 1881, where he says that unless the certificates were issued he would "advise the vice-president to call a meeting of the company plaintiff to take such measures as may be deemed necessary to protect the Oriental Co.'s interest."

The force of Mr. Widemann's testimony that a fraud had been committed in procuring the stock, is somewhat weakened by his conduct in negotiating with the London Co. for the purchase of their stock in the Honolulu Co., and otherwise dealing with them as the *bona fide* owners of the stock. I refer mainly to his written proposition of June 28th, 1881, to pay a royalty to the company defendant for the instruments used in commutation of their stock, and where he signs himself as "President of the Hawaiian Bell Telephone Co."

A letter from the secretary of the Oriental Telephone Co., (Limited), of date 13th July, 1882, to Mr. Adams is in evidence, in which the company repudiates the idea that Mr. Hubbard

could have undertaken to promise that the Hawaiian Co. should have the exclusive sales at the islands of all telephones; or that they would be bound by any such representations.

I find upon a review of the whole case that the consideration for the allotment to the Oriental Bell Telephone Co. of the 450 paid-up shares of the stock of the company plaintiff was the Patent Rights and concessions then held by that company, which covered the "Bell Hand Telephone" and the "Blake Transmitter," and that this consideration has not failed.

Also, that the defendant's company's assignors (the Oriental Bell Telephone Co.) did not, as in the bill alleged, represent that no telephone instruments could be manufactured, bought or sold without the consent of that (the last-named) company, and that said company had the sole and exclusive right to dispose of the same, etc., and therefore the bill is dismissed with costs.

Messrs. F. M. Hatch & E. Preston, for the plaintiffs.

Messrs. A. S. Hartwell & S. B. Dole, for the defendants.

Honolulu, May 5th, 1883.

H. R. MACFARLANE *vs.* SCHOONER JENNIE WALKER.

IN ADMIRALTY. BEFORE JUDD, C.J.

MAY, 1883.

A collision at night between two schooners, one running before the wind, and the other close-hauled on the port tack, held to have been caused by lack of proper lookout on the former vessel, and absence of lights on the latter: and damages divided.

DECISION OF JUDD, C.J.

The libellant was the owner of a Hawaiian schooner of 42 tons burden, named the Kaala, and claims \$6000 damages for her loss by collision with the schooner Jennie Walker, which it is claimed was occasioned by her culpable negligence and carelessness.

It is proved, in my opinion, that on the night of the 10th of May, at about 12:45 A.M., the Jennie Walker, a Hawaiian schooner of 138 tons burthen, was coming down from Hawaii with a cargo of sugar, deeply laden, and running down the Oahu channel before a strong trade wind with her sails "wing and wing," bound for Honolulu. When off Koko Head she collided with the Kaala which was standing off shore on the port tack, close-hauled, bound for Heeia, Koolau, on the windward side of this island. Just before the collision the Jennie Walker's helm was put to starboard, and this made her sheer off a little, and her jib-boom went through the Kaala's jib. The shock of the collision was sufficient to rouse those who were in the Jennie Walker's cabin, and the vessels became fouled, and the sea being rough, the Jennie Walker's anchor tore down the Kaala's bow and she went down bow-foremost and sank in very deep water. The Jennie Walker's sails were lowered soon after the collision and before the Kaala sunk. Her officers and crew clambered over into the Jennie Walker and were all saved. There was no moon that night, but the stars were visible and sky clear except when occasional rain squalls from the land obscured them.

Thus far there are no contradictions. The libellant introduced Captain George Townsend, the master of the Kaala, the mate Jacob Kaia, the lookout John Kawai, and Daniel Keliikapu a sailor, who all swear that the Kaala was provided with lights as required by the Statute of 1880 (entitled An Act for Preventing Collisions at Sea) to wit, a red light in the main rigging on the port side and a green light on the starboard side, rigged the same way, about six feet above the rail; that both these lights were lit at sunset and were burning brightly at the time of falling in with the Jennie Walker; that the lookout was stationed in the boat midships and saw the Jennie Walker coming down on them, some say fifteen minutes before the collision, some say the vessels were the width of the Court House apart. On the other hand Captain Henry Neisen, of the Jennie Walker, Tetaua, the sailor who was steering, and Frank

Mice, the lookout who was on deck at the time, as well as Mr. Feuth, first mate, John Naulo, steward, Andrew Erickson, Carl Ohlsen, John Dower, Thorwald Tolkilsen, passengers, and Bill Rotumah and Taio, of her crew, say they saw no lights on the Kaala. The crew of the Kaala, however, say that the port light of the Kaala were swept off by the foreboom of the Jennie Walker, the blow carrying away the main-rigging, and if this is true, those on the Jennie Walker who came on deck after the collision or who were aroused from sleep by the shock of the collision (that is, all but the captain, the steersman, and the lookout) were not in position to say whether the port light may not have been burning at the moment of collision.

I know it often occurs that the feelings of seamen become strongly enlisted in favor of their respective vessels, which colors their testimony, but in this case the contradictions are flat and irreconcilable. That same night, however, the Kaala was passed by the schooners Moi and Waioli. Two of the Moi's crew testify that they passed near enough to recognize the Kaala, and she had no lights, and Kaikaai, the second mate of the Waioli, says that when they passed the Kaala there were no lights on her. I think the preponderance of testimony is in favor of the proposition that the Kaala's lights were not burning at the time of the collision, which is a breach of the Act of 1880 referred to.

But it is proven by the testimony and not denied by the respondent, that the lookout of the Jennie Walker was stationed on the house aft of the mainmast, and but a few feet ahead of the man at the wheel. The captain says that the lookout and the helmsman called out together, "a sail on the starboard bow." The captain says the mainsail was on the starboard side guyed out; this is also supported by the lookout and many others, though others say the mainboom was on the port side. I think the captain and lookout are more likely to be correct in this respect. Now, if the lookout was stationed aft of the mainmast and on the port side, as he says he was, his view forward would be obstructed by the mainsail which was at right angles with

the vessel. The captain says the vessel was taking in water over each side, and that it was wet forward, as the reason why the lookout was placed as he was. But this is no excuse. He was not in a proper place.

Says Clifford, J., in the case of *The Ottawa*, 3 Wallace, 273, "Lookouts must be persons of suitable experience, properly stationed on the vessel, and actually and vigilantly employed in the performance of this duty. Proper lookouts are competent persons other than the master and helmsman, properly stationed for that purpose on the forward part of the vessel. Lookouts stationed in position where the view forward, or on the side to which they are assigned, is obstructed, either by the lights, sails, rigging, or spars of the vessel, do not constitute a compliance with the requirements of the law," etc.

There are abundant authorities to this effect. *The Genesee Chief vs. Fitzhugh*, 12 How., 443; *The Northern Indiana*, 3, Blatch., 105, are cases in point.

It was by article 14A of the Act of 1880, incumbent upon the *Jennie Walker*, being a vessel "running free," to keep out of the way of the *Kaala*, she being close-hauled; and it is quite possible to believe that even if the *Kaala* had no lights, the *Jennie Walker* might have avoided the collision if she had had a proper lookout who would have seen the *Kaala* in time to avoid her. The neglect of the *Kaala* in not displaying proper lights did not absolve the *Jennie Walker* from observing on her part the laws of navigation and all reasonable and practicable precautions. *The Grey Eagle*, 9 Wallace, 505.

Having thus found that both vessels were in fault, I hold, according to the current of modern decisions, that the amount of damage sustained by the owner of the *Kaala* for her loss, and the damage to the *Jennie Walker* resulting from the collision, must be divided between the parties. Costs in the same way.

The matter is referred to S. B. Dole, Esq., a Master in Chancery, to assess the damages and report to the Court.

Since this judgment was delivered I have been shown a recent case decided by the Judicial Committee of the Privy Council

of Great Britain, May, 1882, *The Hochung* and *The Lapwing*, where this eminent Court held "where two vessels are damaged by collision, for which both are to blame, one for wrongful navigation and the other for a breach of the regulations for preventing collisions at sea, it not being shown that such breach could not possibly have contributed to the collision, the damages are to be divided between the parties according to the Admiralty rule—which is, that each party shall obtain from the other half of the damage which he has suffered."

It would be difficult to find a case resembling more closely in every respect the one at bar.

F. M. Hatch, for libellant.

E. Preston & W. R. Castle, for respondent.

Honolulu, May 22d, 1883.

In re PETITION OF T. H. HOBRON FOR WRIT OF
PROHIBITION.

BEFORE JUDD, C.J.

JULY, 1883.

District and Police Justices have jurisdiction of actions to recover summary possession of land only where relation of landlord and tenant exists between the parties.

It appearing that the Police Magistrate had jurisdiction, the Court here declines to enquire whether he decided correctly on the evidence: and orders the writ of prohibition dissolved.

DECISION OF JUDD, C.J.

There was presented to the Judges of the Supreme Court during the present term, a petition by T. H. Hobron, of Wailuku, Island of Maui, setting forth that on the 20th of May, 1882, an action of ejectment for the recovery of certain premises situated in Kahului, was commenced against him in the Police Court of Wailuku, by John Boardman; that on the 25th May, judgment was rendered in favor of said Boardman, and that there has

issued or is about to issue from the said Police Court, in pursuance of said judgment, a writ of possession to put the said John Boardman or his representatives in possession of said premises; that the said Police Court was not competent to try such action, and has exceeded its jurisdiction in the trial and hearing thereof; wherefore the petitioner prays that a writ of prohibition may issue from this Court directed to the Judge of the Police Court of Wailuku, and to John Boardman, his agents, attorneys and representatives, and all persons acting in his or their behalf and to the officers charged with the execution of said writ of possession, commanding them to desist and refrain from any further proceedings in the aforesaid action or in the execution of said writ of possession.

The writ was issued and made returnable before the Supreme Court on Saturday, the 28th July.

The Police Justice made no answer. George E. Boardman, on behalf of himself and G. W. Willfong, executors of the will of John Boardman, deceased, answered, in substance, as follows: That in the year 1879, T. H. Hobron (the applicant) took possession of the premises described in the summons from the Police Court; that in September, 1881, he paid John Boardman \$40 as rent for the premises; that on the 16th March, 1882, notice to quit said premises was served upon Hobron, and thereupon summary proceedings to recover possession of the premises were commenced in the Police Court of Wailuku, and judgment was rendered in favor of the plaintiff. That these proceedings were lawfully commenced and prosecuted, and were in no sense an action of ejectment, except so far as summary proceedings prescribed by the statute shall be so considered; that said Police Court had and now has full power, jurisdiction and authority to try such cases and to enforce the same; wherefore the respondent prays that the writ of prohibition be dissolved.

Jurisdiction is conferred upon District and Police Courts, by §940 of the Civil Code, to entertain actions to recover possession of land in certain cases, as fully set forth in the statute.

The summary proceedings are confined to cases where the relation of landlord and tenant exists between the parties.

See *Kaaihue vs. Crabbe*, 3 Haw., 768, and *Coney vs. Manele*, 4 Haw., 154.

From the testimony taken in this Court, it is clear that the Police Justice, in the case which has given rise to this proceeding, had jurisdiction.

It was an action under the statute by John Boardman to recover possession of the premises of T. H. Hobron, who was a tenant by parol after notice to quit.

The summons issued does indeed read as an ordinary complaint in ejectment to try the title of land, of which only the Supreme and Circuit Courts have jurisdiction. But it being established that the Police Court has jurisdiction, this Court cannot now enquire into the question as to whether the magistrate decided correctly upon the evidence before him. If errors existed, they should be corrected some other way, as by appeal, etc.

The statute defining the nature and to regulate the issuing of writs of prohibition, Chap. 39, Acts of 1876, prescribes, that the writ may issue on the ground that the cognizance of the said cause does not belong to the inferior Court, or that it is not competent to decide it, and on the answer if the Court shall be of the opinion that the applicant has made out his case, the prohibition shall be made perpetual, otherwise it shall allow the inferior judge to proceed to the trial and judgment of the case, and if the inferior judge has rendered judgment, and execution has been issued, the writ may be applied to prevent the execution.

Having found that the inferior Court had cognizance of the suit complained of, the writ of prohibition is dissolved.

Smith & Thurston, for applicant.

W. R. Castle, for respondent.

Honolulu, July 28th, 1883.

KALE AIHONUA *vs.* AHI *et al.*

EJECTMENT. BEFORE JUDD, C.J.

JULY, 1883.

Under §1448 and §1454, Civil Code, the estate of a decedent held to descend, one-half to his widow and one-half to the child of his half-brother: and the grandson of decedent's sister is excluded.

DECISION OF JUDD, C.J.

This is an action of ejectment to recover one undivided half of two pieces of land at Kapalama, Honolulu, being the land described in Royal Patent No. 2081, to Hiki, and containing one acre and 48-100ths.

The plaintiff claims that on the death of Hiki, there survived his widow Moa, and Napoe, who was a son of Hiki's half-brother Nahina, and that on the death of Napoe, which occurred last year, his interest descended to Pukila, who was Napoe's nephew. Pukila conveyed his interest to the plaintiff, Kale Aihonua, by deed dated 1st December, 1882.

The defendant Ahi claims under a lease from Hookano, who is the grantee of one Hiwauli, who was the son of Nalu, who was the son of Mauolonui or Mauwalenui, a sister of Hiki the patentee, that is, a grandnephew of Hiki.

Kamali, the other defendant, is in possession of the house-lot which he claims under a deed from Moa, the widow. The defendants claim that Hiwauli, being a grandson of the patentee's sister, is a nearer relative of Hiki than Napoe, who is, as I have said, a son of Nahina, the half-brother of Hiki; both Hiki and Nahina have the same mother Kawaa, and Nahina's father being Kuuke, and Hiki's father being Kanemakai.

Kindred of the half-blood inherit equally with those of the whole blood in the same degree, Civil Code, Section 1454. And by Section 1448 of the Civil Code, "If an intestate dies leaving no issue, nor father nor mother, his estate descends, one-half to

his widow and the other-half to his brothers and sisters, and to the children of any deceased brother or sister by the right of representation."

On the death of Hiki, therefore, one-half of his estate descended to his widow Moa, and the other half to Napoe, who was the child of Nahina, the deceased's half-brother. The statute does not say "to the children and heirs" of a deceased brother or sister; if it did, Hiwauli, as the grandson of Hiki's sister, would inherit equally with Napoe. Napoe is one degree nearer Hiki than Hiwauli, and inherits to his exclusion.

Judgment must be rendered for the plaintiff for one undivided half of both these parcels of land, with \$50 and costs.

W. R. Castle, for plaintiff.

W. L. Holokahiki, for defendants.

Honolulu, July 31st, 1883.

KINI (w.) vs. NAPUA.

EJECTMENT. BEFORE JUDD, C.J.

JULY TERM, 1883.

A party taking under a will does not take the property subject to the construction placed upon the will by the Probate Court: such construction is *obiter dictum*.

DECISION OF JUDD, C.J.

The plaintiff in this case is an elderly Hawaiian woman, and seeks to recover in this action the possession of some land at Kalihi, Oahu, to wit: All those parcels of land described in Royal Patent No. 667, granted to Luaiki. It is proved in evidence that Luaiki died over thirty years ago, and the plaintiff claims that she is a niece of Luaiki, her mother (Umiokalani) being Luaiki's sister, and I think she has substantiated her relationship. Luaiki had a brother Kahilahila, who died,

leaving a child Kahookahi, who married Kahue and had issue Kaimiaina.

Kaimiaina married Kahookuilani, and had issue Eliama.

The defendant Napua claims the land by virtue of a deed from the Kahookuilani above-mentioned, and shows in evidence a deed from George Kaihenui to Kahookuilani. This Kaihenui was the husband of Eliama, and they had a child who died while still a minor. Its parents therefore inherited its property. And if the case rested here, the defendant, as the representative of Kahilahila, the brother of Luaiki, would inherit this estate in common with the plaintiff. But the records of the Probate Court in the estate of Luaiki are put in by the defense. By them it appears that in 1858 a paper, purporting to be the will of Luaiki, was presented to the late Justice Robertson for probate. It was contested by the children of Luaiki, but finally admitted to probate, "the Court understanding that the property was left by the testator to his children, and that Kaimiaina was left the executor of his will and guardian of his children."

I translate the will as follows:—

Kalihi, Kona, Oahu,
July 15th, 1853.

Will of my real and personal estate to my moopuna.

I hereby devise all my property to my moopuna, J. Kaimiaina; my real estate and my personal estate and my two children, Waipio a daughter, and Pele a son; do you two, my children, remain (on the land) and your guardian is my moopuna until the time when you shall be provided for, then the guardianship of my moopuna over you two shall cease, and all the property shall be my moopuna's, and if he desires to divide the property of you (oukou) then he may divide it, but if one of you (oukou) shall die, then his share shall go to the survivor. Nevertheless, it shall be left to my moopuna to say whether to divide or not. No one shall interfere with the property of my moopuna.

The following is the property: Four horses, one house-lot, one kuleana and four orange trees on Konohiki's land.

The witnesses to this testamentary disposition of mine are (signatures) Keukaha, Kaulili and Pulio.

(Signed) LUIKI, devising to J. Kaimiaina.

I am of the opinion that it was the intention of the testator to devise his estate to his moopuna, or grand-nephew, Kaimiaina.

The construction of this will most favorable to Luaiki's children would be that the land was left to them and to Kaimiaina as joint tenants, the land to go to the survivor of them.

Luaiki died of the small-pox in 1853, his son Pele died a few days later. Waipio, the daughter, was present in the Probate Court as a witness, and survived a few years. Kaimiaina died quite recently on Molokai.

The death of the children of Luaiki before Kaimiaina vests the estate in him, and therefore his representative, the defendant, is entitled to the estate.

It was contended by plaintiff's counsel that the party taking under a will, takes the property subject to the construction placed upon the will by the Probate Court. I do not think so. Judge Robertson's opinion as to the construction of this will, while sitting in probate, is *obiter dictum*.

E. Preston, for plaintiff.

W. R. Castle, for defendant.

C. T. GULICK, Minister of Interior, *vs.* WILLIAM
FLOWERDEW.

IN EQUITY. BEFORE AUSTIN, J.

SEPTEMBER, 1883.

The Minister of Interior, as custodian of Government property, is the proper party to file a bill for an injunction against laying rails for a tramway in the streets of Honolulu.

The Minister of Interior, under the laws investing him with control of public property and internal improvements, has no right to grant a franchise for a street railway in Honolulu: the right to grant such franchise rests entirely with the Legislature.

It appearing that the contract, if any, as to a tramway, between the Minister of Interior and defendant, was in the nature of a franchise, the Court grants permanent injunction against the laying of the tramways.

DECISION OF AUSTIN, J.

This is an action in equity to obtain an injunction. All the facts in the case are admitted. Only conclusions of law from these facts are in controversy.

Nearly all the essential facts rest in documents which are quoted at large in the pleadings and cannot well be epitomised. I shall, therefore, quote the bill and answer in full. They are as follows:

Supreme Court of the Hawaiian Islands.—In Equity.—Charles T. Gulick, Minister of the Interior, vs. William Flowerdew. Before Mr. Justice Austin.

To the Honorable A. FRANCIS JUDD, Chief Justice and Chancellor, or other Justice of the Supreme Court:

May it please Your Honor: Humbly complaining, your orator, Charles T. Gulick, of Honolulu, respectfully represents that he is His Majesty's Minister of the Interior, and as such Minister of the Interior he files this bill of complaint and represents unto the Court:

1st. That by law there is vested in him as such Minister of the Interior, the general supervision and control of internal public improvements within this Kingdom, and that his authority in that regard extends to and includes the construction, supervision and repair of all public streets, roads and bridges within this Kingdom.

2d. That there is now resident within this Kingdom one William Flowerdew, who has for some time past contemplated and been determined upon the project of constructing upon, along and through various streets in the city of Honolulu and suburbs in this Kingdom, a system of tramways or street railways for the purpose of running thereon cars or other vehicles for the transportation of passengers and kindred purposes.

3d. That said William Flowerdew, defendant herein, has caused to be prepared a certain plan or draft (which is hereby offered for the inspection of the Court), purporting to be a map of the streets of Honolulu and suburbs, upon which plan or map are indicated the proposed routes of his said proposed system of tramways, along and upon which streets and routes said defendant intends and threatens to so construct a system of tramways as aforesaid.

4th. That said defendant has no authority from your orator as such Minister of the Interior, nor from any other person or source thereunto sufficiently authorized, permitting or licensing said defendant to so construct such system or any system, or and that any such unauthorized construction upon said streets, or any streets of said city of Honolulu, or any of its suburbs, and that any such unauthorised construction upon said streets, or any of them, of such system of tramways or any part thereof, or any act of construction of such tramway or any interference with or entry upon said streets, or any of them, with the purpose and object of undertaking such act of construction on the part of said defendant or those acting under him, would be in contempt of your orator's right as His Majesty's said Minister of the Interior, to control such streets, would be a violation of other public and private rights, destruction of His Majesty's

highway, prejudicial to the dignity of the law, and a menace to the public peace.

5th. And your orator further shows that he is informed and believes, and so states the truth to be, that said defendant has engaged and employed one Julius H. Smith, a civil engineer, to superintend and direct the construction of said system of tramways. That upon the 24th day of August, instant, said Smith called upon your orator, at your orator's office in the capitol, in Honolulu, and informed and notified your orator officially and on behalf (as said Smith alleged) of said defendant, that said defendant intended to and would commence the construction of said system of tramways upon the streets of the said city on the morning of the then following day, and your orator then and there forbade such threatened acts on the part of said defendant.

6th. And your orator further shows that on the 27th day of August instant, (said threats on the part of said defendant to commence said construction on August 25th not having been carried out) your orator received from said defendant a letter and from said Smith a letter, each notifying your orator that said defendant would positively commence the construction of said tramways at the corner of King and Punchbowl streets in said city, on the 28th day of August, 1883. Said letters (copies of which are hereto annexed, marked respectively "Exhibit A" and "Exhibit B," and made part of this complaint) are hereby tendered for the inspection of the Court. And your orator believes that said defendant will execute his threat of so entering upon said streets, and then and there digging up the surface of the same and constructing therein and thereon said tramways.

7th. And it is further shown to the Court that your orator is informed and believes, and so states the truth to be, that said defendant has imported into this Kingdom, and now holds in readiness for such purposes, large quantities of iron rails and other material appropriate and necessary to the construction of said proposed tramways, and that said defendant has declared his design to use said material for such purpose.

8th. And your orator further shows that he is informed, and believes, and so states the truth to be, that said defendant professes and pretends to hold a letter or other written instrument received from John E. Bush, your orator's predecessor in office as such Minister of the Interior, which instrument, as is claimed by said defendant, fully authorizes him, the said defendant, to so construct a system of tramways upon the streets of Honolulu and suburbs as aforesaid. But your orator protests, and avers that such instrument, if any such defendant has, contains, and can contain, no legal or valid authority or license to said defendant to so construct tramways or any tramway as aforesaid :

9th. All which doings or pretences on the part of said defendant are contrary to equity and good conscience, and tend to the manifest wrong and injury of His Majesty's Government and the public at large.

In consideration whereof, and to the end therefore, that said defendant may full, true, direct and perfect answer make to all and singular the matters and things hereinbefore stated and set forth, and that as fully and particularly as if the same were here again repeated, and he thereunto particularly interrogated (but not upon oath, answer on oath being hereby expressly waived) : and that your orator may have a decree perpetually enjoining and restraining said defendant, his engineers and agents from interfering with or entering upon any of the streets of the said city of Honolulu or its suburbs with intent or purpose to dig or tear up the surface, or construct or place thereon or therein any iron or other railroad or tramway, except as may hereafter be authorized by law :

And that, pending the hearing herein, a temporary injunction may issue to said defendant, his attorneys, solicitors, engineers, agents, and all others acting or claiming to act under his authority, commanding them to absolutely desist and refrain from any act of destruction or other interference with the surface of said streets, or any act of construction of said tramways therein or thereon till the further order of this Court :

And that your orator may have such further relief, or such other relief as the nature of the case may require, and to equity may seem meet:

May it please the Court to grant unto your orator the writ of injunction, also the process of summons of this Court, citing said William Flowerdew at a time, and under a penalty to be therein named, to appear and answer the premises, and further to stand to and abide the order of the Court herein.

(Signed)

CHARLES T. GULICK,

Minister of the Interior.

W. M. Gibson, Attorney-General.

C. W. Ashford, solicitor for complainant.

HAWAIIAN ISLANDS, }
HONOLULU. } SS.

Charles T. Gulick, being duly sworn, deposes and states that he has heard read the foregoing bill of complaint, and that the same is true, except as to those matters therein stated to be on information and belief, and as to those matters he believes it to be true.

(Signed)

CHARLES T. GULICK.

Subscribed and sworn before me this 27th day of August, 1883.

BENJ. H. AUSTIN,

Justice Supreme Court.

Let process and injunction issue as prayed for, returnable before me, at my chambers, on Monday, September 3d, 1883.

(Signed)

BENJ. H. AUSTIN,

Justice Supreme Court.

Honolulu, August 27, 1883.

EXHIBIT A.

Honolulu, August 27, 1883.

To His Excellency CHARLES T. GULICK, Minister of the Interior,
etc.:

SIR,—I have the honor to inform you that pursuant to the terms of the authority granted to me by your predecessor, under

date of 30th of June, I propose to commence preparations for laying horse tramways, and have instructed my engineer, Mr. Julius H. Smith, accordingly.

I propose to commence work at the corner of Punchbowl and King streets, and have to request that you will instruct the road supervisor not to interfere with the work.

I have the honor to be, Sir, your most obedient servant,
(Signed) W. FLOWERDEW.

Honolulu, August 27, 1883.

To His Excellency CHARLES T. GULICK, Minister of the Interior,
etc.:

Sir,—Having verbally notified you that I proposed commencing work and breaking ground for the purpose of laying rails for the tramway Mr. Flowerdew intends laying—upon Saturday, August 25th, at 7 A.M.—I have now the honor to notify you that I was ordered by Mr. Flowerdew not to do so that day, but shall, upon Tuesday, August 27th, commence such work at or near the corner of King street and Punchbowl street.

I have the honor, Sir, to be your obedient servant,
(Signed) JULIUS H. SMITH, C.E.

Supreme Court of the Hawaiian Islands.—In Equity.—Charles T. Gulick, Minister of the Interior, vs. William Flowerdew.
KALAKAUA, by the Grace of God, of the Hawaiian Islands—King.

To WILLIAM FLOWERDEW, his attorneys, solicitors, engineers, agents and all others acting or claiming to act under his authority, greeting: In accordance with a prayer in a bill in equity this day filed against said William Flowerdew in this Court by Charles T. Gulick, Minister of the Interior:

You are commanded, under such penalty as the Court may see fit to inflict for contempt of this writ, to absolutely desist and abstain from any act of destruction or other interference with the surface of the streets of the city of Honolulu or suburbs, and from any act of construction thereon or therein of

any iron or other tramway or street railroad, or any entry upon any of said streets, with the intent and purpose of committing any such act until the further order of this Court.

Witness the Honorable BENJAMIN H. AUSTIN, Justice of the Supreme Court at Honolulu, this 27th day of August, 1883.

[Seal] (Signed) WILLIAM FOSTER,

Clerk of the Supreme Court.

W. M. Gibson, Attorney-General.

C. W. Ashford, solicitor for complainant.

THE ANSWER.

*In the Supreme Court of the Hawaiian Islands.—In Equity.—
Charles T. Gulick, Minister of the Interior, vs. William
Flowerdew.*

Before Mr. Justice Austin.

The answer of William Flowerdew, the above-named defendant, to the bill of complaint of the above-named plaintiff.

This defendant, saving and reserving to himself all benefit and right of exception to the said bill of complaint, for answer thereunto saith:

1st. That he admits the allegations contained in the first paragraph of the said bill of complaint.

2d. That he admits the allegations contained in the second paragraph of the said bill of complaint.

3d. That on or about the 15th day of June last, Walter Murray Gibson, Minister of Foreign Affairs and Attorney-General of this Kingdom, called upon this defendant, at his rooms in Honolulu, and conversed with this defendant as to his views in projecting and carrying out his scheme for laying horse tramways in the streets of Honolulu and the suburbs thereof, and expressed his general concurrence therewith, and gave this defendant to understand that His Majesty's Government would help this defendant to carry out the said undertaking.

4th. And the said Walter Murray Gibson informed this defendant that the matter was within the Department of the

Interior, and that the defendant should apply to the Minister of the Interior (then John E. Bush) for such authority, and stated that the matter would be favorably represented to the said John E. Bush.

5th. In consequence of the above interview, a formal application to the Minister of the Interior was prepared, to be presented to him on his return from Kauai, and this defendant wrote and sent such application, in the words and figures following, that is to say:

Honolulu, June 26th, 1883.

His Excellency JOHN E. BUSH, Minister of the Interior, etc.:

SIR,—Considering the great public benefit and convenience that street tramways have proved in the cities and towns of Europe, the United States of America, and elsewhere, and considering that the capital of this Kingdom should not longer be without such accommodation as cities of smaller size and importance possess, I respectfully request the requisite permission and authorization for myself and any others who may associate with me, whether incorporated hereafter or not, to lay down tramways and run cars for the conveyance of passengers, etc., in the usual manner as in San Francisco and New York, in the streets of this city of Honolulu and suburbs.

In view of the expense and trouble involved in this work and preliminary expenses, I would request that a reasonable time be allowed to construct the tramways and open them to the public before any further permission be given, say six months, to make surveys and select the streets and roads, and three years to finish the construction of tramways.

Naturally however, so as to get a return on capital invested, the concluded portions of these tramways would be opened to the public as speedily as possible.

If it is considered necessary, I shall be prepared to enter into a fair and reasonable guarantee that the tramways shall be constructed within the time specified.

As it is important for me to know, before the arrival of the mail steamer, whether or not I am to be enabled to commence

SEPTEMBER, 1883.

this work, kindly permit me to solicit an early decision. I have the honor to be, sir, your most obedient servant,

(Signed)

W. FLOWERDEW.

And this defendant received from the said John E. Bush an answer to the said letter, which answer is in the words and figures following, that is to say:

Department of the Interior,

Honolulu, June 30, 1883.

SIR,—Having considered your application for permission and authority to lay down tramways and run cars in the streets and roads of this city of Honolulu and suburbs, and recognizing that this work is one of public utility, you individually, or with such others as may associate with you, whether incorporated hereafter or not, are hereby authorized to lay down tramways and run cars for the conveyance of passengers in such streets and roads in the city of Honolulu and suburbs as you may select.

You are hereby granted six months from date hereof to make surveys and select streets and roads, and three years in which to finish the construction of said work; and until the expiration of said periods of six months and three years respectively, no similar permission will be granted.

You are authorized and permitted to operate any portions of said tramways as they may be finished.

Considering that the permission to lay the tramways will lapse for any streets or roads not operated upon within three years, and feeling assured, from the tenor of your letter, that you intend to commence the work without any unnecessary delay, I do not deem it necessary to ask for any further guarantee.

In the event of you desiring to form a corporation, you will have to make a company and apply for a charter in the usual manner.

Hoping you will succeed in your efforts to initiate and carry out this work to a successful issue,

I have the honor to be, Sir, your obedient servant,

(Signed)

JOHN E. BUSH,

Minister of the Interior.

This defendant then wrote and sent to the said John E. Bush a letter in the words and figures following, that is to say:

Honolulu, July 2, 1883.

His Excellency JOHN E. BUSH, Minister of the Interior, etc.:

SIR,—I have the honor to acknowledge receipt of your letter dated June 30, granting permission to make tramways in this city, and I thank you for your kind wishes for the success of the undertaking.

I leave for San Francisco by the mail steamer now due, and shall make the necessary arrangements for proceeding with this undertaking.

I have the honor to be, Sir, your most obedient servant,

(Signed)

W. FLOWERDEW.

6th. That this defendant accordingly proceeded to San Francisco and incurred considerable expense in the purchase of material and cars for the purpose of the said undertaking, and engaged an engineer for the purpose of superintending and laying down of such tramways, acting upon the belief that he was properly authorized by the said John E. Bush, by his letter of the 30th day of June last. And this defendant, acting upon the same belief, caused the plan mentioned in the third paragraph of the plaintiff's said bill to be prepared and forwarded to the plaintiff. And this defendant submits that the said John E. Bush had good and sufficient authority to give the permission contained in his said letter of the 30th day of June, and he denies that the carrying out of the said undertaking would be in contempt of the plaintiff's rights, as His Majesty's Minister of the Interior, to control said streets, or that the same would be a violation of other public and private rights, or destructive of His Majesty's highway, or prejudicial to the dignity of the law, or a menace to the public peace.

7th. And this defendant further saith that he is advised and believes that should the plaintiff succeed in preventing this defendant from carrying out his said undertaking, according to the permission granted as aforesaid, the Hawaiian Government is and will be responsible to this defendant for damages sustained by him in consequence thereof.

8th. That this defendant admits the several allegations contained in the fifth, sixth and seventh paragraphs of the said bill.

9th. That the plaintiff well knows, and at the time of the filing of his said bill of complaint well knew, that this defendant held the said letter of the 30th day of June. And this defendant admits that he does claim such letter to have the effect stated to be claimed by the defendant in the eighth paragraph of the said bill.

10th. That, on the 14th day of August last, this defendant received a letter from the plaintiff in the words and figures following, that is to say:

Department of the Interior,
Honolulu, August 14, 1883.

Mr. WILLIAM FLOWERDEW, Hawaiian Hotel:

DEAR SIR,—In reference to the scheme of laying down street tramways in the city of Honolulu, for which you claim a ministerial authority, and which you desire to inaugurate, and which has been the subject of our late conversations, I would say that our laws are quite clear in defining the powers of a minister, and especially of the Minister of the Interior, in any work of internal improvement, distinctly stating that his action must depend upon the "Consent of the King in Privy Council," and does not confer on him the authority to act independently; consequently His Majesty's Government feel, that in justice to the interest you represent, as well as to enable them to sustain your enterprise to advantage, they must conform strictly to the spirit of the law, which requires that your proposition should be submitted for the consideration of His Majesty in Privy Council.

I have the honor to be your obedient servant,

(Signed) CHAS. T. GULICK,

Minister of the Interior.

Which letter was answered by this defendant on the 16th of the said month as follows:

Honolulu, August 16, 1883.

His Excellency C. T. GULICK, Minister of the Interior, etc.:

SIR,—In answer to your communication of the 14th instant,

in regard to permission granted me by His Majesty's late Minister of the Interior to lay down tramways and run cars in the streets and roads of the city of Honolulu and its suburbs, I beg to say that I have no objection whatever to your laying the matter before the Privy Council, if you so wish.

I have the honor to be, Sir, your most obedient servant,

(Signed)

W. FLOWERDEW.

And this defendant is informed and believes that the said matter has never been brought before the honorable the Privy Council.

11th. That on the 20th and 24th days of August, this defendant wrote and sent to the plaintiff letters in the words and figures following, that is to say:

Honolulu, August 20, 1883.

To His Excellency C. T. GULICK, Minister of the Interior, etc.:

SIR,—Having received report and outline of street railway from the engineer, I have the honor to hand you copies for your information.

You will observe that the rails will be laid from the water front at bottom of Fort street up to Kukui street into Nuuanu street, also along Beretania street from Fort street to and up Nuuanu street and along King street from beyond Oahu prison to Waikiki.

It is intended to lay a single line of rails only, three feet six inches wide, flush with the surface of the streets, the cars drawn by horse power only.

The cars after sunset will carry the usual lights of street railway cars or any modifications that may be desired by your department.

To ensure that the undertaking is carried on in a proper manner, I have secured the services of Mr. Julius H. Smith, of San Francisco, an engineer who is well known for his capacity and ability, and who has laid several street railways in San Francisco and elsewhere.

I have the honor to be, Sir, your most obedient servant,

(Signed)

W. FLOWERDEW.

Enclosures: 1st. Engineer's report; 2d. Map of Honolulu, with outline of street railway marked in red.

Honolulu, August 24, 1883.

To His Excellency C. T. GULICK, Minister of the Interior, etc.:

SIR,—Referring to my letter of the 20th instant, covering engineer's report to me and plan of Honolulu, I wish to say that the statement and report is relative to the work intended to be proceeded with at present, and is made without prejudice to the rights granted to me by the late Minister of the Interior, which rights I do not waive, and only forward the report and statement for your information.

The engineer advises me that it may be found desirable to go or return by Beretania street; but if this is decided upon, due notice will be given before the expiration of the six months allowed, as well as of any other street it may be decided to run cars upon.

Although the engineer advises only a single line of rails at present, still if the traffic shows that the public would be better served and accommodated by a double line, that will be laid before the expiration of the time allowed for the construction of the work, excepting always those streets, or parts of streets, that are rather narrow for a double track.

In fact, everything will be done that the engineer considers right and proper, and for the comfort and convenience of the people.

The engineer in charge is fully authorized to enter into any agreement at any time as to the detail of the work; that it will be conducted in a true and workmanlike manner, and according to the usual method of similar roads in other cities.

I have the honor to be, Sir, your most obedient servant,

(Signed)

W. FLOWERDEW.

12th. That on the 25th day of August last, this defendant caused to be prepared an agreement carrying out the terms of the said letter of the 30th day of June, and forwarded the same through His Majesty to the said plaintiff, and on the following day received a document for this defendant's concurrence and

signature, which document is in the words and figures following, that is to say:

Honolulu, August, 1883.

His Excellency CHARLES T. GULICK, Minister of the Interior.

SIR,—Considering the great public benefit and convenience that street tramways have proved in the cities and towns of Europe, the United States of America and elsewhere; and considering that the capital of this Kingdom should not be longer without such accommodation as cities of smaller size and importance possess, I respectfully request the requisite permission and authorization for myself, and any others who may associate with me, whether incorporated hereafter or not, to lay down tramways and run cars for the conveyance of passengers, etc., in this city of Honolulu and suburbs, to which the undersigned ventures to submit a synopsis of a general plan for contract and agreement, viz:

FIRST.

That he proposes to lay street railways and run cars upon passing such streets at present selected as follows: To commence from the water front at bottom of Fort street up to Kukui street, thence along Kukui street to Nuuanu street, also along Beretania street from Fort street to Nuuanu street, thence along Nuuanu street towards the Pali, also along King street from beyond the Oahu prison road to Waikiki. It is under consideration the laying of rails and running cars on Beretania street, but if this is decided upon, due notice will be given before the expiration of the six months allowed, as well as of any other street or road it may be decided to run cars upon.

It is intended at present to lay a single line of rails only, three feet and six inches gauge, the cars to be drawn by horses or mules only: no locomotive will be used.

Should the application of compressed air or electricity be considered advisable, this will be a matter for consideration with the then Minister of the Interior, or by arbitration if necessary.

Although at present only a single line of rails will be laid

with the necessary turnouts, still if the traffic shows that the public would be better served and accommodated by a double line, that will be laid if necessary before the expiration of the time allowed for the construction of the road, except in those streets or portions of streets rather narrow for a double track. In fact everything will be done that the engineer considers right and proper for the comfort and convenience of the people.

The rails will be laid in the centre of the streets as near as may be, and it will not be necessary at any point to interfere with the free passage of vehicles of any kind.

In the more crowded portions of the routes the work will be done at night or early morning, so as not to interfere with the free passage of vehicles.

SECOND.

The rails used will not be under eighteen pounds per yard, and where necessary, heavier rails will be employed. They will be laid flush with the streets, and in a proper and workmanlike manner.

The cars will be of the best American type, and some have been already ordered from a leading builder in San Francisco.

The cars, after sunset, will carry the usual lights of street railway cars.

Bridges blocks will be provided for proper protection of the fire hose in case of fire.

Should any matters arise, not mentioned or provided for in this memorandum, they shall be arranged hereafter by agreement between the Minister of the Interior and the engineer in charge of the work.

The buildings and site of stable of the undersigned will be established within the city limit of Honolulu, as regulated by law, and that a license be granted him under the rules and regulations governing such matters. And if located at such place as is necessary to lead the water thereon, that a supply necessary for the use of the establishment should be provided, the undersigned paying the usual rates.

THIRD.

If necessary, the Government is to grant the privilege of

taking of sand and stones from any quarry belonging to the Government, the quantity of which will be according to its requirement, at every irregularity of the street or road, not to exceed—tons, and if a larger quantity is required permission will be at once supplied. Also, for the temporary use of its carts, wagons and machinery, if not otherwise occupied; the Government receiving such compensation as may be agreed upon, together with the privilege of prison labor if required.

FOURTH.

The undersigned is willing to concede the privilege and extend the courtesy to those personages passage free as are denominated in the following tables, viz.:

Their Majesties the King and Queen and the Royal Family, to Government officials, police and messengers on special duties. That the Government will be allowed free use and run cars on their rails, though not interfering with their traffic.

FIFTH.

The term or period of the franchises granted shall not exceed — years.

SIXTH.

The passenger fare will not exceed the fares enumerated in the following table, viz.:

	Cts.
From Fort street to Waikiki bridge, named Apuakehau, to and back	15
To Kapiolani Park	20
To Kalihi Bridge (Ewa road)	20
To Haniakamalama (Nuuanu)	15
To Pawaa (street to Manoa Valley)	10
To Mausoleum (Nuuanu Valley)	10
And within the prescribed stations above mentioned and the city proper	5
And every additional mile over the above named stations shall be charged extra to each mile	5

SEVENTH.

The undersigned have fully authorized Mr. Smith, the engineer regularly employed in the service of this work, to

concur and agree with your Excellency any further matters that are not expressed in this memorandum.

I have the honor to be, Sir, your most obedient servant.

13th. That this defendant declined to sign such document and caused notice to be given as aforesaid of his intention to commence work.

All which doings and pretences on the part of the plaintiff this defendant submits are contrary to equity and good conscience, and prejudicial to the rights of this defendant and tend to subvert His Majesty's Government and the good faith thereof and the proper respect therefor.

Edward Preston & Cecil Brown, solicitors and of counsel for defendant.

BY THE COURT.

The defendant first objects, in abatement, that the plaintiff is not the proper person to bring this action.

I believe he is.

Section 39 of the Civil Code says the Minister of the Interior shall have the charge, custody and supervision of all Government property whatsoever, not expressly placed in the charge of some other officer.

The Government has a property in the public streets of Honolulu, and the property is in the custody of the plaintiff, under Sec. 39.

Section 40 of the Civil Code provides that the Minister of the Interior shall be accountable for the preservation and safe keeping of the Government property, and it shall be his duty to prosecute any person injuring, trespassing upon, or wrongfully taking the same.

The defendant threatened to go upon one or more of the public highways of the city of Honolulu, and tear them up for the purpose of establishing a street railway. This, if accomplished without right, would be a permanent and irreparable trespass and injury to the property of the Government in the public streets, and the plaintiff had full power, and it was his duty, if the defendant proposed to act without right, to bring this action to restrain him from so acting.

I think therefore that the action was properly brought by the plaintiff.

The second question is: Had the defendant a right to establish a street railway in the streets of Honolulu or any part of them?

I say upon the facts, I think not.

Briefly, those essential facts are that the Minister of Foreign Affairs, and Attorney-General *ad interim*, called upon the defendant, and after some conversation gave defendant to understand that His Majesty's Government would help the defendant to carry out his scheme for laying horse tramways in the streets of Honolulu and the suburbs thereof. That the Minister of the Interior had charge of the matter, to whom defendant should apply, and that the matter would be favorably represented to such minister.

Thereupon the defendant applied to the then Minister of the Interior, Mr. John E. Bush, in writing as above quoted, who answered in writing as above quoted, and to which the defendant replied in writing as above quoted.

If the Minister of the Interior had an authority to do what he did, as shown by his letter to the defendant, of July 30, 1883, it may be that that letter and the defendant's reply to it constituted a valid contract which would authorize the defendant to proceed, as he threatened to in this case. The defendant claims that the minister had such authority, and if so, then the minister has granted to the defendant a perpetual and exclusive right, at his option, to establish in the streets of Honolulu and suburbs, and over and upon every foot of those streets, a system of street railways such as are usual in San Francisco and New York. If it were to be conceded that the Minister of the Interior had power to make such a grant, it would be an extraordinary, unusual and unprecedented grant, which ought not to be made, and of which the public might well complain. The right sought to be conveyed is perpetual, because no time is mentioned for its discontinuance, and exclusive because, if fully exercised, no other person could exercise a similar right.

The authority of the Minister of the Interior to grant such a right rests, if anywhere, in statute.

On examining the statutes, the only provisions I can find which could possibly be supposed to authorize such a grant, are Sections 34, 42 and 167 of the Civil Code.

Section 34 says: It shall be the duty of the Minister of the Interior to have a general supervision over the internal affairs of the Kingdom, and to faithfully and impartially execute the duties assigned by law to his department.

Section 42 says: The said minister, by and with the authority of the King in Cabinet Council, shall have power to lease, sell, or otherwise dispose of the public lands and other property, in such manner as he may deem best for the promotion of agriculture and the general welfare of the Kingdom, subject, however, to such restrictions as may from time to time be expressly provided by law.

Section 167 says: The Minister of the Interior shall be, and is hereby charged with the superintendence and management of the internal improvements of the Kingdom; and he may, with the approval of the King in Privy Council, appoint an officer, to be styled the Superintendent of Public Works, to assist him in the discharge of this branch of his duties.

These sections do not authorize the grant of such a right.

The definition of franchise by Bouvier, is a "privilege conferred by grant from the government and vested in individuals."

The rights to operate railroads are such franchises and can only be granted by the government. See 3 Paige, 45; 14 N. Y., 506; Cooley on Constitutional Limitations, pp. 276, 279, 195, 394, 396.

What are known as the surface railway cases, in the State of New York, are leading cases on the matters involved in this case, and those cases all hold, and no well considered case can be found against them, that the granting of a street railway franchise is vested in the legislature, and must be directly or indirectly made by the legislature. Those cases hold, as has been held in England and in most of the United States, that a fran-

chise to operate a surface railway where the rails are flush with the streets, and the cars drawn by horses upon tracks which can be used by other vehicles, if duly granted by the legislature, is not inconsistent with the ordinary use of the public streets, if reasonably exercised, and that those who border on the streets are not entitled to receive compensation as for property taken under the right of eminent domain.

See *Milhan vs. Sharp et al*, 27 N. Y., 188, 194-5; *Kellinger vs. Forty-second Street Railway Co.*, 50 N. Y., pp. 206-9. See also *Storey vs. New York Elevated R. R. Co.*, 90 N. Y., pp. 122, 154-5.

In these cases will be found ample and conclusive authority to show that no such meagre words, as are contained in the section quoted, can give to the Minister of the Interior the right to grant the franchise which he sought to grant by his letter of June 30, 1883.

On examining the Constitution, and the law as to corporations, and the special railroad acts of the legislature, I can find no enactment which I think would authorize the grant of a street railway franchise. To obtain such a grant I think resort must be had to the legislature. The granting of such a right I think might well be vested with the King in Privy Council, where such conditions could be attached and such specifications required as would render the exercise of it not oppressive, as it would have been under the letter of June 30th.

The defendant says he has expended large sums of money upon the faith of that letter. If so it is a misfortune, and it may be that he has a claim for it. By that letter there was in terms secured to him a most unusual franchise, the nature of which, it would seem, might have led him to greater caution than he seems to have exercised, before making so great expenditure.

The other documents and facts plead and quoted, though proper as evidence in the case, are not specially important in deciding it.

The plaintiff in this case sought to induce the defendant to

submit the controversy to the King in Privy Council, which the defendant refused to do.

Thereafter on August 20 and 24, the defendant addressed letters to the plaintiff by which, in the letter of August 20, he proposes to erect a street railway, which might, it may be, prove beneficial to the public, but in the letter of August 24, he still claims to retain all the franchises which are secured to him by the letter of June 30. The defendant further says that he transmitted to the plaintiff, through His Majesty, a proposed contract which was not returned to him, and that soon thereafter he received a copy of a proposed contract which the defendant declined to sign.

It is not proved that this paper was prepared by the plaintiff or with his concurrence. It is quoted at large. Aside from the fact that it proposes that a term be fixed for the continuance of the franchise, it admits to exist all the other features detailed in the letter of June 30. The exclusive nature of the franchise is conceded.

The whole matter hinges upon the legal validity of the letter of June 30.

The views I have stated lead me to grant the permanent injunction prayed for in the plaintiff's bill.

C. W. Ashford, for plaintiff.

E. Preston and *Cecil Brown*, for defendant.

Honolulu, Sept. 10, 1883.

J. C. GARRETT *vs.* H. R. MACFARLANE.

IN EQUITY. BEFORE JUDD, C.J.

OCTOBER, 1883.

A Court of Equity has jurisdiction to relieve against a forfeiture of land by landlord for non-payment of rent: and the objection that the tenant has a plain and adequate remedy at law, overruled.

DECISION OF JUDD, J.

This is a bill in equity alleging that the plaintiff is the assignee of the lease of certain land at Ahuimanu, Koolaupoko, Oahu, under a certain indenture of lease dated the 16th March, 1881, and the title and interest of the lessor has been assigned to the defendant; that until the 9th March, 1883, the rent was paid; that since that date the plaintiff has been ready and willing to pay the rent, but has not known how many acres of land he was liable to pay rent for, and the defendant has not since said 9th March demanded rent from him. That on the 7th of July the plaintiff received a written notice from defendant, stating that he had taken possession of the premises, for non-payment of rent for seven months, and for abandonment of plaintiff, and defendant forthwith entered the premises, evicted the plaintiff, and has held possession ever since and prevented the plaintiff from entering upon and enjoying the same. That plaintiff had crops of sugarcane on the premises which defendant destroyed. That plaintiff has tendered to defendant the rent he believed to be due to defendant and has requested him to deliver up the premises and to make restitution for the damage done, which defendant refuses to do or to accept the rent.

That the plaintiff has suffered great damage from crops destroyed, and is liable to suffer irreparable damage by reason of being prevented by defendant from cultivating other crops of sugarcane and from erecting machinery for grinding the cane

and manufacturing the sugar and from planting new crops; that the plaintiff has no adequate relief except in a Court of Equity.

The bill prays that defendant be ordered to answer and to deliver the possession of the premises to the plaintiff, and to accept the rent which shall be adjudged to be due, and for damages for the injury done him, etc.

This is demurred to on the ground that there is nothing disclosed in the bill for which a Court of law would not furnish a complete and adequate remedy, and that this would be the ordinary action of ejectment in which both the possession of the premises and damages are recoverable.

It is urged on behalf of the plaintiff that equity has power to relieve against forfeitures incurred for a non-compliance with the terms of a lease where compensation can be decreed for the breach of the covenant.

In an early case, *Saunders vs. Pope*, 12 Vesey, 287 (1806), Lord Chancellor Erskine says: "There is no branch of the jurisdiction of this Court more delicate than that which goes to restrain the exercise of a legal right."

"That jurisdiction rests only upon this principle, that one party is taking advantage of a forfeiture, and as a rigid exercise of this legal right would produce a hardship, a great loss and injury on the one hand arising from going to the extent of the right, while on the other hand the party may have the full benefit of the contract, as originally framed, the Court will interfere, where a clear mode of compensation can be discovered." The illustration given is the case of a contract to pay rent, with a covenant and clause of entry for breach, the intention being to secure the payment of the rent and not to put the landlord to his suits from time to time but to enable him to recover possession of the premises. The Chancellor says: "In that case equity is in the constant course of relieving the tenant, he paying the rent and all expenses, and placing his landlord in exactly the same situation."

Chancellor Kent, in *Skinner vs. Dayton*, 2 Johns. Ch. Cases,

535 (1817), says: "In all the cases in which the Court does interfere with the legal right, it must clearly appear that full compensation can be made so as to render the party perfectly secure and indemnified, and place him in the same situation as if this occurrence had not happened."

Chancellor Walworth, in *Baxter vs. Lansing*, 7 Paige, 352 (1838), says: "The decisions in the more recent English cases limit the active interference of the Courts of Equity in behalf of the tenant to those cases only where the act or omission, by which the forfeiture was incurred, was the result of accident or mistake, and where compensation can be made to the adverse party; or where the penalty or forfeiture, stipulated for in the lease, is in the nature of a mere security for the payment of money."

Lord Eldon held in *Hill vs. Barclay*, 18 Vesey, 58, that "relief against forfeiture of a lease for breach of covenant was not to be extended beyond the case of payment of money, as in the instance of rents, to the other covenants, as to repair, etc."

Taylor, in his work on Landlord and Tenant, §495, says: "When a tenant has forfeited his lease by breach of the covenant for the payment of rent, Courts, both of law and equity, consider the clause of re-entry to be mainly inserted for the landlord's security, and will interfere in the tenant's behalf, although all the formalities of a common law demand may have been complied with, upon his satisfying the rent due and any damages which the landlord may have sustained in consequence of this omission. And in general, a Court of Equity will relieve the tenant from a forfeiture where it has been incurred by neglecting to pay any certain sum of money, the interest upon which can be calculated with certainty, and the landlord thereby compensated for the inconvenience he may have sustained by the tenant's withholding the payment." And again in Sec. 496, "But Courts of Equity are only closed against the tenant where the forfeiture is incurred by the wilful and culpable neglect to fulfil the terms of his covenant; and not in cases where the omission has been incurred by inevitable

accident. And the rule to be applied in all cases (except that of forfeiture for non-payment of rent) now seems to be, that Courts of Equity will relieve where the omission and consequent forfeiture are the result of mistake or accident, and the injury and inconvenience arising from it capable of compensation; but where the transgression is wilful, or the compensation impracticable, they invariably refuse to interfere."

Judge Story is to the same effect.

Discussing the jurisdiction in equity to relieve in cases of penalties in certain instruments, the design of which is to secure the due fulfilment of the principal obligation, the author says the origin of this jurisdiction is obscure. He says, further, in Sec. 1313: "It is highly probable that relief was first granted upon the ground of accident, or mistake or fraud, and was limited to cases where the breach of the condition was by the non-payment of money at the specified day." In Sec. 1314: "The true test (generally, if not universally) by which to ascertain whether relief can or cannot be had in equity, is to consider whether compensation can be made or not."

Sec. 1315: "The same doctrine has been applied by courts of equity to cases of leases, where a forfeiture of the estate and an entry for the forfeiture, is stipulated for in the lease, in case of the non-payment of the rent at the regular days of payment; for the right of entry is deemed to be intended to be a mere security for the payment of the rent." Sec. 1316: "The true foundation of the relief in equity in all these cases is, that as the penalty is designed as a mere security, if the party obtains his money or his damages, he gets all that he expected, and all that in justice he is entitled to."

The learned author, in the 1323 Sec., says that in England the law seems to be "that in all cases of forfeiture for the breach of any covenant, other than a covenant to pay rent, no relief ought to be granted in equity, unless upon the ground of accident, mistake, fraud or surprise, although the breach is capable of a just compensation." In Sec. 1324, "Courts of equity will not interfere, in cases of forfeiture for the breach of

covenants and conditions, where there cannot be any just compensation decreed for the breach."

The above doctrine seems just, and I see no reason why it should not be adopted as law in this country. It seems to me to be against conscience where, as in the lease we are considering, the clause for re-entry is intended merely as security to enforce the principal obligation, that is, the prompt payment of the rent, that this should be perverted to the deprivation of the tenant of his estate, a loss wholly disproportionate to the injury done to his landlord by the non-payment of the rent due.

The question as to whether the injury to the landlord is capable of compensation cannot be determined except upon the answer and proofs. So also the other point made at the argument, that the re-entry was made on account of the abandonment of the premises by the lessee, this cannot be considered until the proofs are in. That this ground is stated by the defendant to the plaintiff in a notice annexed to the bill, does not commit the plaintiff to its truth.

The forfeiture sought to be relieved is alleged in the bill to be for non-payment of rent, and therefore an allegation that it was not paid through accident or mistake, is not necessary.

As I find that the plaintiff has set forth in his bill sufficient facts which, if true, would entitle him to relief, the demurrer must be overruled, with leave to defendant to answer over in twenty days.

Smith & Thurston, for plaintiff.

C. W. Ashford, for defendant.

Honolulu, October 18th, 1883.

R. A. MACFIE, JR. *vs.* KILAUEA SUGAR CO. *et al.*

IN EQUITY. BEFORE JUDD, C.J.

NOVEMBER, 1883.

A manager and part owner of an incorporated sugar plantation held to be a surety, and not a principal debtor, in a mortgage given by the corporation as security for advances: and therefore entitled to bring suit against the corporation to compel it to pay the debt or indemnify him.

Demurrer to bill sustained on other grounds, with leave to amend.

DECISION OF JUDD, C.J.

This bill alleges substantially that the plaintiff is the owner of seventy-four and one-half shares of the capital stock of the Kilauea Sugar Co., an incorporated company; that on the 10th February, 1880, plaintiff executed a mortgage upon said shares and others which he then held, in all 149 shares, to the firm of H. Hackfeld & Co. to secure the payment of \$110,697.66 according to the tenor of four promissory notes for \$27,673.67 each, payable to the order of said mortgagees on the 31st July, of 1881, 1882, 1883 and 1884 respectively. That the first two of said notes have been paid by R. A. Macfie, Sr., of Scotland, and one-half of the shares are now held by him released from the mortgage, under an agreement which is filed. That by the terms of the mortgage the plaintiff also agreed to secure the payment to H. Hackfeld & Co. of one-half of all amounts which might be advanced by them to said Kilauea Sugar Co., and charged up to the plaintiff in account current, until said account current should be closed as provided by the terms of the said mortgage. That plaintiff was, at the time of executing the mortgage, the manager of said Kilauea Sugar Co.'s plantation, and had personal supervision and control of all expenditures on the plantation and of all advances drawn for on H. Hackfeld & Co. That plaintiff's being manager was the sole consideration for his agreeing to secure payment of one-half of said advances and it was understood that plaintiff was to be individually liable only

for advances made while he might be manager. That on the 28th April, 1883, the plaintiff was notified that he had been removed from the office of manager, and upon the 1st May, 1883, that the account current between plaintiff and H. Hackfeld & Co. had been closed and payment demanded of \$52,685.76, being 149-300 of the amount due them and being entirely made up of amounts advanced by H. Hackfeld & Co. to the Kilauea Sugar Co. for the purpose of carrying on the plantation, together with interest, commissions and charges, and no part being for the private account or personal use of the plaintiff.

That H. Hackfeld & Co. also from time to time charged the whole sum to the Kilauea Sugar Co. and have not released the said company from their liability to pay same.

That on 30th July last H. Hackfeld & Co. sold and assigned to William Y. Horner, defendant, all their shares and interest in the Kilauea Sugar Co. and also the two unpaid notes of plaintiff for \$27,673.67 each, and also all their rights, title and interest in the mortgage securing the notes and also all their claims against the plaintiff under the same, and also all their claims and demands against the Kilauea Sugar Co. for moneys advanced and other charges in account current.

The bill further alleges that the whole amount of said indebtedness of the Kilauea Sugar Co. in account current is due and payable now, that the undertaking of plaintiff to secure the payment of one-half of said amount was a contract of guaranty in favor of H. Hackfeld & Co. and that the debt guaranteed was and is the debt of the Kilauea Sugar Co. and not of the plaintiff. That after demand was made on plaintiff to pay one-half of said amount, plaintiff called on the Kilauea Sugar Co. to pay the same, which the said Company refused to do. That said Company has now sufficient property to pay the amount in full and that plaintiff is ready and willing to pay one-half or any portion of said book debt which may remain unsatisfied after all the property of the corporation has been applied for the payment of the same and exhausted.

The bill prays that the defendant Horner may be enjoined

from bringing suit against plaintiff for any portion of said indebtedness of the Kilauea Sugar Co. upon account current until he has exhausted all remedies he may have against said Company; and that the Kilauea Sugar Co. may be ordered to give plaintiff good and sufficient indemnity against any claim which may be made against him on account of said indebtedness and that said Kilauea Sugar Co. may be enjoined from selling or disposing of their property, except crops, or from mortgaging same until they have provided said indemnity, etc.

To this bill defendants demurred, and argument was had thereon on the 27th October. The defendants contend, in substance, that it does not appear by the mortgage on file that R. A. Macfie, Jr., is a surety, but he is rather a principal debtor to H. Hackfeld & Co. and by assignment now to Horner. If, however, he is a surety, then the relief asked for in his behalf is unknown to equity.

The first point upon which this case hinges is whether the plaintiff is a surety. It is clear that as owner of stock in the Kilauea Sugar Co., an incorporated company, he is not personally liable for the debts of the company unless he has made himself so by the terms of the mortgage. It is also clear that the debt now due on the account current between the agents and the Kilauea Sugar Co., is primarily the debt of the defendant company. It is alleged in the bill that this debt was for advances in money, etc., to carry on and develop the plantation and not for the personal account of the defendant. But we must look to the mortgage to ascertain the nature of the liability of the plaintiff as regards this debt; whether he was an original debtor of H. Hackfeld & Co., and by assignment now of the defendant Horner, or whether he is a surety.

The mortgage recites that the mortgagees have loaned to the mortgagor the sum of \$110,697.66, being the purchase money of the stock in the Kilauea Sugar Co., on the mortgagor's promise to secure payment thereof and also one-half of the balance of future expenses of said plantation and interest, etc.

The mortgage further recites that the mortgagor has given H.

Hackfeld & Co. four notes for the amount of the sum of \$110,697.66; And the mortgagor covenants to pay the notes and interest, and also all moneys which may become due and owing from the mortgagor to the mortgagees in account current with them, to be stated quarterly, and in such accounts current the mortgagor shall be debited in the first place with one-half of all moneys advanced or paid by the mortgagee from the date of the 26th January, 1880, on account of said plantation and its laborers, rents, taxes, business and expenses with interest, etc., etc., and be credited with one-half of the receipts, etc., and that the account shall be considered due on demand. It is clear from the above extracts from the mortgage that the plaintiff agreed that he should be charged with and that his mortgage should secure one-half the debt of the plantation thereafter accruing, over and above its receipts, and that this debt is made up of moneys advanced on account of said plantation. In short the plaintiff has thus undertaken in writing to secure payment of the debt of another, and has made himself a surety. The debts is one for which the Kilauea Sugar Company is liable, and the bill alleges that H. Hackfeld & Co. also from time to time charged the whole sum to the Kilauea Sugar Co., and have not released them from liability to pay the same.

Having found that the plaintiff is a surety for the debt to the Kilauea Sugar Co., I pass to the question whether he can have the relief prayed for. The debt is now due, as stated by the bill, and demanded of plaintiff and he has in turn demanded payment of the same of the Kilauea Sugar Co., and they have refused payment.

In Story's Equity Jur. Sec. 327, the learned author says, "Sureties, also, are entitled to come into a court of equity, after a debt has become due, to compel the debtor to exonerate them from their liability, by paying the debt. And although the creditor is not bound by his general duty to active diligence in collecting the debt, yet it has been said that a surety, when the debt has become due, may come into equity, and compel the

creditor to sue for and collect the debt from the principal, at least if he will indemnify the creditor against the risk, delay and expense of the suit." And again, Section 639, "Courts of Equity do not stop here. If the debt is due and the creditor does not choose to call upon the debtor for payment, the surety may come into equity by a bill against the creditor and the debtor, and compel the latter to make payment of the debt, so as to exonerate the surety from his responsibility; for it is unreasonable that a man should always have such a cloud hang over him."

Further, Sec. 849, another case of the application of the remedial justice of Courts of Equity by a bill of *Quia timet* is in cases of sureties of debtors and others. "We have already seen that if a surety, after the debt has become due, has any apprehension of loss or injury from the delay of the creditor to enforce the debt against the principal debtor, he may file a bill of this sort to compel the debtor to discharge the debt or other obligation, for which the surety is responsible. Nay, it has been insisted (as we have also seen) that the surety may come into equity and compel the creditor to sue the principal, and collect the debt from him in discharge of the surety, at least, if the latter will undertake to indemnify the creditor for the risk, delay and expense of the suit."

I have examined all the cases cited in support of this text which are available. They are *Wright vs. Simpson*, 6 Vesey, 714, where Lord Eldon says, on 734: "But in late cases, provided there was no risk, delay or expense, as in the case put, of the money in the next room, indemnifying against the consequences of risk, delay and expense, the surety has a right to call upon the creditor to do the most he can for his benefit, and the latter cases have gone further."

In *Nisbit vs. Smith*, 2 Brown, Ch. Rep. 449, Lord Thurlow says: "It is clear and never has been disputed that a surety, generally speaking, may come into this Court and apply for the purpose of compelling the principal debtor for whom he is surety to pay in the money and deliver him from the obligation."

In *King vs. Baldwin*, 2 Johnson's Ch. Rep., 554, Chancellor Kent reviews all the English cases, and says, p. 561: "The surety has a right, on the day the debt is due, to come into chancery and insist on its being put in suit," and further, "I have said, that the surety has a right at any time after the debt is due, to apply to this Court to coerce the creditor to collect his debt." This case went on appeal to the Court of Errors for New York State, and is reported in 17 Johnson, 384. Chief Justice Spencer says: "Courts of Equity when they interpose to compel a creditor, at the instance of a surety, to sue the principal debtor, undoubtedly proceed on the sound and just principle, that it is the duty of the creditor to obtain payment, in the first instance of the principal debtor, and not of the man who is a mere surety that the principal shall pay the debt. The doctrine is, that it is inequitable and unjust for the creditor, by delaying to sue, to expose the surety to the hazards arising from a prolongation of the credit, and that the surety has an equity sufficient to invoke the interposition of the powers of a Court of Chancery for his protection."

Wayes vs. Ward, 4 Johnson's Ch. Rep. 132, is an authority to the same effect. See also *Wooldridge vs. Norris*, VI. Law Reports (Eq. Cas.), 410; and *Gray vs. Seckham*, VII. Law Reports (Ch. appeal cases), 680.

In *Burge on Suretyship*, the writer says: "By the law of England when the liability of the surety has attached in consequence of the default of the principal, the surety—although he has not been sued by the creditor—may apply to a Court of Equity, and compel the principal to relieve him from his liability."

I think sufficient has been quoted above, disclosing ample precedent for a bill of this character, and I recognise the equity of the principal on which it proceeds.

No point was made at the argument that the bill is defective in not alleging that the plaintiff apprehends loss or injury from the delay of Horner to enforce the debt against the Kilauea Sugar Co., and in the respect that the plaintiff should offer to

indemnify Horner for the expense, risk and delay he may suffer by the proceedings to collect the debt of the Kilauea Sugar Co., but I think the bill should be amended in both respects, and sustain the demurrer on this ground, with leave to amend in ten days.

F. M. Hatch & E. Preston, for plaintiff.

P. Neumann, and Smith & Thurston, for defendants.

Honolulu, November 24th, 1883.

RUTH KEELIKOLANI *vs.* COMMISSIONERS OF CROWN
LANDS.

EJECTMENT. BEFORE AUSTIN, J.

DECEMBER, 1883.

Plaintiff, as heir of Kamehameha IV., held entitled to certain lands described in Land Commission Award 10,806, said lands being the private property of said King, and not Crown Lands, although in possession of the Commissioners of Crown Lands, under claim of title.

The conveyance by plaintiff of all her interest in Crown Lands, "and of all lands commonly known, called or reputed to be Crown Lands," held not to include the land in question.

DECISION OF AUSTIN, J.

An important question arises at the outset of this case as to whether the plaintiff has not conveyed away to Claus Spreckels all right and title which she had to the lands which she now seeks to recover in ejectment.

On the 13th day of September, 1880, the plaintiff for the consideration of \$10,000, executed, acknowledged and delivered to Claus Speckels an instrument in writing under seal, whereby she conveyed to him, his heirs and assigns, "all and singular the several lands reserved by His late Majesty Kamehameha III., to himself as his own private property, and mentioned and

specified and declared in and by a certain act, ordinance or law passed on the 7th day of June, in the year of our Lord one thousand eight hundred and forty-eight, entitled, 'An Act relating to the lands of His Majesty the King and of the Government,' to be the private lands of His Majesty Kamehameha III., and commonly called and known as the 'Crown Lands,' together with all rights, easements and appurtenances to the said lands or either of them belonging or in anywise appertaining. And all my estate, right, title and interest both at law and in equity, of, in and to the said lands."

On examining the statute referred to, there is found a long list of lands by name which are reserved by His Majesty Kamehameha III., as his own private property, and are declared by the Legislature to be his private lands; no other lands are so reserved by that act. The lands sought to be recovered in this action are not named in the act, and if what we have quoted were substantially all that the instrument contained, then the title to the land in suit was not thereby conveyed away. But the words quoted are followed by the following general words: "And of all other lands commonly called, known or reputed to be Crown Lands, or to be part, parcel or member thereof and belonging to me or to which I may be now entitled either as heir to His said Majesty Kamehameha III., or to their late Majesties Kamehameha IV., Kamehameha V., my father His Highness the late M. Kekuanaoa, or in any other manner or right whatsoever."

It must be admitted that these latter words quoted would in terms include the lands in suit if they were "called, known or reputed" to be "Crown Lands." And the proofs show that the lands in suit were treated as Crown Lands by the Crown Land Commissioners.

To determine how this instrument shall be construed, it is necessary to refer to certain familiar and well settled principles of law.

In construing a contract, "the first point is to ascertain what the parties themselves meant and understood." Parsons on Contracts, Vol. 2, p. 7.

The intention when found is not absolutely controlling in every instance, but it is always of the utmost importance. *Id.*, page 13, 14.

"Where there are recitals of particular claims or considerations, followed by general words of release, the general words shall be restrained by the particular recital." *Id.*, note R. and many cases cited.

A leading case is *Moore vs. McGrath*, Cowper, 9, decided by Lord Mansfield in the Court of King's Bench in 1774. The principles of that case have never been questioned.

In that case Michael Moore, being seized of a moiety of certain lands in County Mayo and King's County, Ireland, in right of his wife, and being likewise seized of certain other lands in the counties of Roscommon, Clare and Galway, in Ireland, as a paternal estate, executed a deed whereby he conveyed by specific descriptions all the lands held by him in right of his wife. And then the deed added, "together with all other the said Michael Moore's lands, tenements and hereditaments in the Kingdom of Ireland."

The lands held in right of his wife were also by the deed devoted to special uses.

Lord Mansfield considered the whole deed, and decided that the intent of the grantor was plain that he only intended to convey the lands held in right of his wife; that the general words used were of no effect; that had they been intended to convey his paternal estate, those lands, as were the others, would have been described and have been devoted to special uses.

See also *Moore vs. Jackson*, 4 Wend., 58; *McIntyre vs. Williamson*, 1 Ed. Ch., 34; *Rich vs. Lord*, 18 Pick., 322; *Whallon vs. Kauffman*, 19 Johns., 97; *Jackson vs. Stackhouse*, 1 Cow., 122; *Lyman vs. Clark*, 9 Mass., 234; *Coles vs. Hawes*, 2 Johns. Cases, 203, and note; 2 Black. Com., 379.

These cases and citations, and the decisions to which they refer, show the rules of interpretation stated to be well settled and undisputed. We have found no authority against them.

They must control us in the construction of the paper in question. Let us then inquire from that paper what was the intention of the grantor as to what lands were to be conveyed by it. She first speaks of those lands as those "reserved by His late Majesty Kamehameha III. to himself as his own private lands." She at once qualifies this by saying that "they are mentioned and specified, in and by a certain act passed June 7, 1848, to be the private lands" of His Majesty Kamehameha III. She then designates the whole lands referred to as "commonly called and known as the 'Crown Lands.'" Then follows what usually follows the description of the lands conveyed, in all deeds—the general clause granting all rights, easements and appurtenances to said lands and all estate therein.

Then follows the clause which the defendant claims conveys the land in suit, by the words "and of all lands commonly called, known or reputed to be Crown Lands, or to be part, parcel, or member thereof," belonging to the grantor from any source whatever.

I do not think the grantor by this latter clause intended to add anything to the lands theretofore specified and particularly described. I do not believe she could have intended, by a general sweeping statement, without any description, to sell the lands in suit. Had she so intended, I think those lands would have been described as definitely as the other lands were, and their description would have immediately followed the other description, and would have preceded the general clause granting the appurtenances.

I think these words, out of excess of caution, were added by the conveyancer, to be sure that there should be no doubt about the grant of all the lands specified in the act.

I think the latter clause should be construed as though it read—and of all other lands commonly called, known or reputed to be Crown Lands, or to be part, parcel or member thereof, "which I inherit in any way, and which are reserved by His late Majesty Kamehameha III. to himself as his own private

property, and are mentioned, specified and declared by the Act of June 7, 1848, to be his private lands."

Manifestly, I think, the only lands the sale of which was considered and passed upon by the grantor when she signed this instrument, were the lands specified in the act. That she then contemplated the sale of the lands in suit, no description of which was before her, and no definite idea of which could have been in her mind—incautiously, recklessly, and without thought—seems to me impossible. To hold that, by the general words "all other lands called, known, or reputed to be Crown Lands," she intended to put at risk the title to her entire property, upon possible parol proof that at some time it was called, known or reputed to be Crown Lands, would be unreasonable. I do not believe that the grantee conceived or imagined that he was obtaining right to any lands other than those specified in the Act.

I think the grantor's intent in this case must govern the construction of her grant. I think it would be dangerous to hold otherwise.

And this brings me to consider the last question in the case: whether the lands in suit are Crown Lands or belong to the plaintiff, as heir of Kekuanaoa, her father, and Kamehameha V., her brother. It is admitted that the plaintiff is heir as alleged.

But the Attorney-General claims that Kekuanaoa was estopped because he did not assert his title to this land as heir of Kamehameha IV., at the final accounting in the matter of Kamehameha IV.'s estate on January 19, 1869. I can find no principle of law which allows such an estoppel. That proceeding was not for the purpose of settling the title to real estate. It is not pretended that the defendants, or those under or in whose behalf they claim, have been in possession of the lands adversely long enough to countervail the title of the true heirs. That title cannot be divested by less than twenty years adverse possession.

His present Majesty, for whose benefit the defendants hold

the land in suit, does not claim to hold the lands as heir of Kamehameha IV., and he therefore cannot as against the true heirs derive a benefit from the administration of his estate.

If this objection be properly disposed of, there is nothing left upon which the defendants can defend this suit.

It is conceded that Kamehameha IV. was the owner of the lands in suit, when he died, under award 10,806, made to Kamehameha III. That they were never mortgaged and never sold, and that the title to them remains as it did at the death of Kamehameha IV., on November 30, 1863.

On the 8th day of March, 1848, His Majesty Kamehameha III. signed and sealed two instruments, by one of which he conveyed to the Government, for Government purposes, the larger part of his Royal lands, and by the other, which refers to the first, he retained or reserved for himself, his heirs and successors forever, certain lands described. By the Act of June 7, 1848, above mentioned, these instruments are confirmed, and the said lands reserved are described. By this instrument of reservation it has been held, and I shall not now question it, that the title to the lands therein referred to was deflected from its natural course by descent, and became an appanage of the Hawaiian Crown. By that instrument of reservation, His present Majesty holds the beneficial interest in the lands therein referred to while he remains the reigning Sovereign. By that same instrument, and by no other means, and from no other source, the defendants seek to hold, in His Majesty's behalf, the lands in suit. At the time of the death of Kamehameha IV., he owned many other lands besides the lands reserved as Crown Lands. This appears by the proceedings in administration of his estate, which are in evidence. It is also mentioned in the Act of January 3d, 1865, whereby the Crown Lands are declared to be inalienable, and to descend to the heirs and successors of the Hawaiian Crown forever. The lands in suit are a part of such other lands of Kamehameha IV. They are not described or referred to in the instrument reserving the Crown Lands, and were never changed or swerved from their natural

course by descent, which makes the plaintiff the unquestionable owner thereof.

After the submission and before the decision of this case the plaintiff died, and by suggestion on the record pursuant to statute, Charles R. Bishop and R. W. Meyer, the plaintiff's executors and personal representatives, are substituted as plaintiffs in her place.

Let judgment be entered in their favor for the relief demanded in the complaint, with costs.

A. S. Hartwell, for plaintiff.

E. Preston, for defendants.

Honolulu, December 18th, 1883.

IN RE DANIEL LYONS.

CONTEMPT OF COURT. BEFORE MCCULLY, J.

JANUARY TERM, 1884.

The publisher of a newspaper held responsible for an article in the paper reflecting upon a decision of the Chief Justice: and fined for contempt.

MOTION FOR ORDER TO SHOW CAUSE.

And now comes Paul Neumann, the Attorney-General of the Kingdom, and moves the Court for an order to cite Daniel Lyons, publisher of the *Elele Poakolu*, a weekly newspaper published in Honolulu, to be and appear before this Honorable Court, at a time and day fixed by this Honorable Court, to show why he should not be punished for contempt of this Honorable Court, by knowingly publishing on the 19th day of December, A.D., 1883, in the said newspaper, certain malicious and libelous writings reflecting upon a decision rendered by the Chief Justice of this Honorable Court in a matter then pending in the Supreme Court of the Hawaiian Islands, and tending to bring this

Honorable Court and the administration of Justice into ridicule, contempt, discredit and odium.

PAUL NEUMANN,
Attorney-General.

Dated Honolulu, January 7th, 1884.

Let process issue, returnable before the Supreme Court Term, Saturday, 12th January, 1884, at 10 A.M.

L. MCCULLY,
Presiding Justice.

DECISION OF MCCULLY, J.

Upon a service made pursuant to the above information, the said Daniel Lyons appears before the Court and says that he had no knowledge in fact of the contents of the newspaper, his sole business being to print and publish it; and that the editorial business was done by Mr. John Sheldon.

Mr. Sheldon thereupon voluntarily states to the Court that he was the managing editor at the time the communication was received, and should have examined it, but did not, being just then on the point of resigning his position; and gave it to be set up.

Neither Mr. Lyons nor Mr. Sheldon offer information as to the writer of the objectionable article. It is not denied that the matter was of the character charged in the information.

There must be a responsibility somewhere for the publication of libellous matter, and the rule of law is that the publisher is liable, even if he have no knowledge of the contents and be entirely ignorant of its being libellous. 1 Hawk. P. C. 73.

This is a presumption which may be rebutted by special circumstances. Was it so in this case?

It would seem by the statement of Mr. Sheldon, that he was a mere employee, in law, servant of the defendant. He says he would not have permitted the article to appear if he had seen it. It was the course of business at the office that he should read or write all matter for the paper. Now, if by his not reading a communication, it thereby received a character of immunity, and all persons became free from responsibility, clearly the door

would be opened for the irresponsible publication of any unlawful matter. The delegation of the duty of supervising, by the master to the servant, does not free the master. He is to be holden for the neglect or indiscretion of the servant.

Nothing appears in this case why the general rule should not be applied. No special circumstances are shewn tending to induce a belief, on the part of the employee or principal, that this article was one which need not be examined. Mr. Sheldon says he ought to have examined it; that if he had done so, he would not have permitted it to appear. The respondent, then, comes under the general rule of the liability of publishers for what they publish, and of masters for the acts of their servants. It is a legal liability, without reference to personal blame. In view of that I make the penalty a pecuniary one and impose a fine of fifty dollars.

Honolulu, January 16th, 1884.

EMMA KALELEONALANI & RUTH KEELIKOLANI *vs.*
COMMISSIONERS OF CROWN LANDS.

IN EQUITY. BEFORE JUDD, C.J.

JANUARY, 1884.

Plaintiffs, as the heirs of Kamehameha IV., held entitled to premises on Merchant street, Honolulu, known as Honolulu Hale, as against the Commissioners of Crown Lands: said premises being the private property of said King, and not Crown Lands, although in possession of the Commissioners under a claim of title.

A conveyance by Ruth Keelikolani of all her interest in Crown Lands, held not to include the land in question.

DECISION OF JUDD, C.J.

1. The bill alleges in substance that His Majesty Kamehameha IV. died intestate, November 30th, 1863, leaving as his

sole heirs at law, his widow Queen Emma, and his father M. Kekuanaoa, who died intestate, leaving his son Kamehameha V., and his daughter, said Ruth Keelikolani, as his heirs, and that Kamehameha V. thereafter died intestate, leaving the plaintiff R. Keelikolani as his heir-at-law, and that by the statutes of this Kingdom the plaintiffs are entitled, share and share alike, to the private estate of Kamehameha IV.

2. That Kamehameha IV. was seized and possessed in his lifetime, in his private capacity, in fee simple of all that parcel of land situated on Merchant-street, in Honolulu (describing it), being Part 1 of the Award of the Land Commission No. 10,806 to Kamehameha III., which said premises were devised to Kamehameha IV. by will of Kamehameha III., duly admitted to probate.

3. That His Majesty Kamehameha IV., by a recorded deed, conveyed to William Webster, his confidential secretary, the land above described, to enable Mr. Webster to raise money upon mortgage for the use of His Majesty, and that the several mortgages which were thus made have long since been paid and discharged.

4. That on the 25th of October, 1866, the then Commissioners of Crown Lands procured Robert Moffitt, the executor of the will of William Webster, to execute an instrument declaring that said Webster held the premises above described, together with many other parcels of land, as trustee of Kamehameha IV. in order to raise money upon mortgage of the same, which had been paid, and conveying all the right, title and interest of the said Webster in the said premises to the Commissioners of Crown Lands.

That said Commissioners thereupon took possession of the premises and they and their successors have ever since received and collected the rents therefrom.

5. That many of the other lands mentioned in the last-mentioned deed were a portion of the Royal Domain, and the said premises were included in the said instrument by mistake, and so far as the Commissioners have acquired any title to the

premises by virtue of the said instrument, it was as trustees for the heirs of Kamehameha IV.

That the Commissioners claim that the premises comprised portions of the Royal Domain or Crown Lands, and that the heirs of Kamehameha IV. have no title therein, but that the contrary is the truth.

6. That the plaintiffs are unacquainted with business and have to depend on agents for the management of their affairs, and that they have but recently been informed that said premises were part of the private estate of Kamehameha IV., but, on the contrary, have been often informed by the Commissioners of Crown Lands that the said premises comprised a portion of the Royal Domain, and that under the decision of the Supreme Court in the matter of the estate of Kamehameha IV. they were entitled to no portion thereof.

The bill prays that defendants may be decreed to hold the premises, as did William Webster in his lifetime, upon trust for the heirs of Kamehameha IV., and that defendants be ordered to convey all their right, title and interest in and to the said premises to the plaintiffs, and that they may be put in possession of the same and that defendants be ordered to account for the rents and profits, etc.

The answer of the respondents admits the allegations in the first paragraph, but denies the legal conclusion that the plaintiffs are entitled, share and share alike, to the private estate of Kamehameha IV.

As to the second paragraph, respondents deny that Kamehameha IV. died seized in his private capacity of the premises in the complaint described, but admit that he was seized of a part of the said land, describing the same by metes and bounds, and the plaintiffs thereupon disclaimed title in so much of the premises described in their complaint as was conveyed by Kamehameha IV. to the Minister of the Interior, and it was conceded that the portion disclaimed represents the difference between the land described in the complaint and that admitted in the answer.

The third paragraph of the bill is admitted, and also the fourth, except as to the extent of the premises.

The fifth and sixth paragraphs are neither admitted nor denied; and the respondents say that R. Keelikolani on the 30th September, 1880, by deed of that date for a valuable consideration paid her by Claus Spreckels, conveyed and quit-claimed to him all the lands therein mentioned, and a copy of the deed is annexed to the answer. That at the time of the execution and delivery of the deed, the land, the subject of this will, was commonly called, known and reputed to be a Crown Land, or was derived by said Keelikolani as heir to her father and brother aforesaid. That by deed dated August 11th, 1882, Claus Spreckels conveyed to the defendants as such commissioners all his estate in the said premises. And that the respondents claims to hold the premises against both the complainants by virtue of an Act of the Legislature of January 3d, 1865, entitled an Act to relieve the Royal Domain from encumbrance, and to render the same inalienable.

The complainant Keelikolani died on the 24th May, 1883, and C. R. Bishop and R. W. Meyer, executors of her will, make this suggestion on the 5th October, and ask that the suit be continued.

I will confine myself to a brief statement of the conclusions reached by me in this case.

I. The land in question, comprising the premises formerly known as "Honolulu Hale," used as the Government offices for many years, is not in the list of lands reserved by Kamehameha III. for himself and his successors, but was awarded to him by the Land Commission upon application and evidence taken.

II. It was, therefore, the private land of Kamehameha III., and was unaffected by the instrument of reservation of March 8, 1848, and the Act of 9th June, 1848, confirming the same, and came to Kamehameha IV. as private land.

III. On the death of Kamehameha IV., intestate, land of this character would descend not to the successor to the throne, but

to the heirs at law of the King, who are now represented by the plaintiffs.

IV. But Kamehameha IV. had, in his lifetime, conveyed this land to William Webster by deed dated 18th March, 1856, and Mr. Webster had raised money for His Majesty by a mortgage upon this land. The mortgage presented shows it was released, upon payment of the amount secured, by the administrators of the estate of Kamehameha IV.

V. On the 25th October, 1866, Mr. Webster being then deceased, the executor of his will, R. Moffitt, released the premises to the then Commissioners of Crown Lands. This was ineffectual to convey the legal title which W. Webster had, for this was in his devisee. But the title outstanding in another person is not in controversy here. The Commissioners of Crown Lands take nothing by the executor's release.

VI. So far then, the complainants are entitled to relief as against the Crown Commissioners who are in possession under claim of title. But there is urged in avoidance of Keelikolani's claim, her conveyance to Claus Spreckels, the interest conveyed being now held by respondents. Does this deed include the premises in controversy? By it Keelikolani conveys for a valuable consideration to Claus Spreckels all and singular the several lands reserved by His Majesty Kamehameha IV. to be his own private property, and mentioned and specified and declared by a certain Act passed on the 7th June, 1864, and commonly known as Crown Lands, together with all rights, easements and appurtenances to the said lands or any or either of them belonging, "and all my estate, right, title and interest both at law and in equity of, in and to the said lands, and of all other lands commonly called, known or reputed to be Crown Lands, or to be part parcel or member thereof, and whether belonging to me or to which I may be now entitled, either as heir to His said Majesty Kamehameha III., or to their late Majesties Kamehameha the IV., Kamehameha the V., my father, His Highness the late M. Kekuanaoa, or in any other manner or right whatsoever."

The language above used is broad enough to cover the land in question, for it was commonly called, known and reputed to be "Crown Land," and such lands Keelikolani conveys her rights in to Mr. Spreckels, whether entitled to them as heir of Kamehameha III., IV. or V., or of Kekuanaoa. The evidence is that all the lands which Kamehameha IV. had, whether in the reserved list of 1848, or lands which came to him in any other way, were treated by Webster as Crown Lands, and that the premises in dispute were taken possession of by Gov. Dominis as Crown Lands after the Act of 1864 passed, and it has ever since been leased and treated as such. Queen Emma herself says she did not know it was not Crown Land until recently so informed.

The general rule is clear as to construction of deeds, that the meaning and intention of the parties themselves should be ascertained if possible from the instrument and from the whole instrument. 2 Greenleaf's Cruise, pp. 295, 299.

An important rule of construction is that "Where the lands are first described generally, and afterwards a particular description is added, that shall restrain the general words." 2 Greenleaf's Cruise, p. 345.

It is immaterial whether the particular description follows or precedes the general words.

"Where there is a particular recital in a deed and general words of release are afterwards inserted, the generality of the words shall be qualified by the recital." 2 Greenleaf's Cruise, p. 304.

"General words shall be aptly restrained according to the subject matter or person to which they refer." Broom's Legal Maxims, p. 304.

Pothier says: "However general the terms may be in which an agreement is conceived, it only comprises those things respecting which it appears the contracting parties proposed to contract and not others which they never thought of." 1 Poth. Obl., p. 98.

The leading case is *Moore vs. Magrath*, Cowper, 9, decided by

Lord Mansfield in 1774. See also *Lyman vs. Clark*, 9 Mass., 235. *Willis vs. Ferris*, 5 Johnson, 335, 345. The question in every case is, what was intended to be conveyed?

But this land was not Crown Land in the sense that it descended to the successors of the throne, and it was not affected by this limitation. Did Keelikolani intend to convey anything but her supposed claim to the Crown Land? I think not. She was not bound by the mistake into which not only she but her co-complainant and many others had fallen, in supposing that the land in question was in the reserved list and entailed, as it were, to the Sovereigns of Hawaii. But it may be objected that she had no valid claim to the Crown Lands, for they passed to the heir and successor to the throne, which she was not, and not to the heir at law, and so the land in dispute and other lands under the same title, coming to her by descent through Kamehameha IV. and M. Kekuanaoa and Kamehameha V, were the only lands of which she had title to convey. The answer is obvious, her intention, as gathered from the deed as a whole, was to convey to Mr. Spreckels her interest and claim, whether valid or invalid, to the Crown Lands, and not to convey all property inherited by her from her father or her royal half-brother. To hold that this deed, by force of the language employed, includes a piece of land which came to Keelikolani by inheritance from Kekuanaoa, who inherited it from Kamehameha IV., who owned it as private estate, merely because it had been called and reputed to be "Crown Land," would compel me to hold that it includes land derived by Keelikolani from Kekuanaoa, which came to him by inheritance from Victoria Kamamalu, or from any other source, provided it had been known or called (whether erroneously or not is immaterial) "Crown Land."

As I have said, this land was not Crown Land, descendible to the next King, but the property of the King as Alexander Liho-liho, and Keelikolani did not intend to convey any such land to Mr. Spreckels.

VII. But it is urged that the Act of 1865 to relieve the royal domain, etc., cast the duty upon the administrator of Kameha-

meha IV. to exhaust all the private lands of Kamehameha IV. before drawing the money appropriated by the Legislature for the payment of his debts, and as the administrator did not sell this land, supposing it to be Crown Land, the heirs of Kamehameha IV. are now estopped to claim the land, for if the administrator had done his duty he would have sold it.

But the grant of the Legislature was for the benefit of the reigning Sovereign, and I cannot see how the heirs of the private estate of the King are bound on any equitable doctrine to surrender it for a consideration which did not move to them from the respondents.

The equitable lien which the Government may have upon the land, by virtue of its grant to Kamehameha V. having relieved it of a mortgage, is another question—but the Government is not impleaded nor does it hold possession of the premises.

Upon a careful review of the whole case, I am of the opinion that the complainants are entitled to the relief prayed for.

A. S. Hartwell, W. R. Castle & F. M. Hatch, for plaintiffs.

E. Preston, for defendants.

Honolulu, January 19th, 1884.

JOHN McKEAGUE *vs.* M. NEISSER, *et al.*

IN EQUITY. BEFORE JUDD, C.J.

FEBRUARY, 1884.

A corporation, named as grantee in a deed, held to be a necessary party defendant in a suit to cancel the deed: the fact that it is a foreign corporation, not registered under our laws, makes no difference.

It must be alleged that the deed is in Defendant's possession or that the claims an interest in it.

Where one agreement refers to another of even date as an additional consideration: some averment disposing of the latter agreement should be made in the bill.

DECISION OF JUDD, C.J.

The bill prays, among other things, for the cancellation of a certain indenture dated the 30th of June, 1882, between J. McKeague of the first part and "the Heeia Sugar Plantation Company, a corporation organized and existing under the laws of the State of California, U. S. A., and carrying on business at Heeia, Koolaupoko, Island of Oahu, as cultivator and manufacturer of sugar and other products of sugarcane, of the second part," by which the property constituting the Heeia Plantation is sold to the said company.

Fraud is alleged on the part of the defendant M. Neisser and that the said indenture was delivered to him upon certain promises never fulfilled, and that it was by defendant put of record.

Also that the said Heeia Sugar Plantation Company was organized and incorporated for deceitful and fraudulent purposes and to impose upon and defraud the orator, and that said company is a foreign corporation and has failed to file with the Minister of the Interior the required designation of a suitable person and place where and upon whom legal process can be served, and has not in other respects complied with the requirements of the statute in such case made and provided to enable said corporation to take hold and convey real estate. Also that the said Neisser and his confederates, not having paid the orator any consideration for the sale of the said plantation, have ejected him therefrom and that said Neisser is now in possession of same, etc.

The bill is demurred to by the defendant Neisser on the ground that the Heeia Sugar Plantation Company, a corporation therein named, is a necessary party to the bill.

Also that the bill seeks to obtain a decree against the defendant to deliver the deed of the 30th June, 1882, for cancellation, whereas it is not alleged that the deed is in the possession or control of the defendant or that he has or claims any interest in said deed.

It is a fundamental rule in equity that the rights of no man can be finally decided in a Court of Justice unless he has had a

full opportunity to appear and vindicate his rights. Story's Eq. Jur. Sec. 72.

It is equally true that all persons materially interested in the subject matter of a suit, are to be made parties to it so that there may be a complete decree, which shall bind them all. *Id.*

Applying these principles, the Heeia Sugar Plantation Company, being named as the grantee in the deed plaintiff now seeks to have cancelled, is a necessary party. But it is urged by plaintiff that the company has not complied with our laws and so it cannot hold real estate and has no rights to be affected by the decree. This Court cannot decide this question in advance of the proof. Enough is set out in the bill to show that the company was incorporated in California and that it is the grantee in the deed attacked. It must have an opportunity of setting up whatever equities it may have, and I think the bill is demurrable for this reason.

As to the other ground of demurrer, that the deed is not alleged to be in the possession or control of defendant Neisser, or that he claims or has any interest in same, I think such allegations are necessary in order that a complete decree may be made against him.

The remaining ground of demurrer is that the agreement of April 9th, 1881 (Exhibit B.) refers to another agreement of even date as an additional consideration, but the bill does not set it out or refer to it. I think that good pleading would require some averment disposing of this agreement; if the orator is ignorant of it or if it was never executed, he should say so; or if it was executed and it is not in his possession and he is unacquainted with its contents, he can so allege. If it was not referred to in the agreement exhibited, as part of the consideration, it could be left to the defendant to plead it if he chose.

Demurrer sustained. The bill may be amended and answered in fourteen days.

J. M. Davidson, for plaintiff.

P. Neumann & E. Preston, for defendant Neisser.

Honolulu, February 12, 1884.

L. S. THOMPSON *et al.* vs. HALAWA SUGAR CO.

IN EQUITY. BEFORE McCULLY, J.

APRIL, 1884.

A contract for planting sugarcane by one party and grinding it by another is assignable by either, and enforceable by the assignee of each against the assignee of the other.

Sundry planting contracts construed as to amount of plantcane and ratoons to be furnished by one party and ground by the other.

Injunction will not be granted to restrain the bringing of suits in law and equity, upon the mere apprehension or fear that such suits will be brought.

DECISION OF McCULLY, J.

The bill recites that on the 25th of October, 1879, Lyman S. Thompson, one of the plaintiffs, and T. P. Tisdale, became the lessees for a term of years of certain lands and a sugarmill in Kohala, Hawaii; that in February of 1880, Thompson assigned his interest to Tisdale, and that in February, 1883, Tisdale assigned the lease and premises to certain persons who have been incorporated, and as such corporation are the defendants. That beginning October 27th, 1879, sundry contracts were made with Tisdale and Thompson, and later with Tisdale, by sundry persons, to plant cane to be ground at the Halawa Mill, all of which contracts were successively assigned with the mill property to the defendant, and on the planters' side passed by assignment to the complainants. A particular description of the contracts and assignments will be given below. The bill alleges that by reason of these assignments, defendant corporation holds that the complainants are bound to plant, cultivate and deliver cane and ratoons as prescribed by the contracts between the original parties, whereas the complainants deny that they are so bound. That there are many parties having distinct rights or interests in the matters and things here involved, which cannot be properly decided by action at law, and that only a Court of Equity can determine whether the

complainants are bound, and to what extent, and can enforce and regulate the execution of any obligations. The bill prays for decree that the defendants' claims are without foundation in law or equity, and for injunction against prosecuting the same, or bringing actions at law or suits in equity for non-compliance or for specific performance, and for further relief.

The answer, setting forth sundry particulars of fact, is as follows:

"Said defendant reserving to itself all manner of right of exception to the manifold errors and insufficiencies of said complainants' bill of complaint, for answer says:

That it admits the execution of the various contracts and assignments named in the first eight articles of said bill, but does not admit that the tenor and legal effect of the same is correctly set forth in said bill; and for greater certainty crave leave to refer to the originals when produced.

Said respondent is ignorant as to the alleged assignment from Butler and Blaisdell to complainants, but avers that such assignment, if any, was made without the consent of respondents, or of the person through whom respondent claims, and that said Butler and Blaisdell have never been released from their liability to fully perform all of the contracts made by them, and respondent says said Butler and Blaisdell should be made parties plaintiff.

Said respondent further says that said T. P. Tisdale, respondent's lessor, in the year 1883 procured a charter of incorporation to be granted to him and his associates for the purpose of carrying on the business in which said Tisdale was then engaged, of the cultivation of sugarcane and the manufacture of sugar at said North Kohala; that subsequently to the granting of said charter, said Tisdale made a conveyance to said company, the defendant corporation, of all his interest in said business and in the leases and contracts named in said bill, he being at that time a large stockholder in said corporation.

Said respondent further says that said contract made by said Paty with said Tisdale, was assigned by said Paty with the con-

sent of said Tisdale to said Butler and Blaisdell, and said Butler and Blaisdell agreed with said Tisdale to perform and carry out the same; and that so far as the said J. M. Smith was concerned in said sale it was as agent for said Paty, as this respondent is informed.

That said respondent denies that it has made any of the claims in regard to said contracts set out in said bill; but does claim that said Butler and Blaisdell and said complainants, if they have taken assignments of said contracts as alleged, are bound to fully perform said contracts according to the true intent and meaning thereof.

That on the 6th of December, A.D., 1882, said Butler and Blaisdell having less cane planted than the minimum amounts called for by the contract made by Philip Butler, dated October 7th, 1879, and the contract made by said Paty, dated January 1st, A.D., 1880, to wit, less than sixty-five acres of cane, made a supplemental agreement with said Tisdale, being the contract referred to in the 7th Article of complainant's bill, by which it was agreed that said Butler and Blaisdell should plant in the year 1883 forty acres of cane under said two contracts in lieu of fifty-five acres which they were bound to plant; that said Tisdale by said agreement leased to said Butler and Blaisdell fifteen acres of land for said purpose, and said Butler and Blaisdell agreed to find the balance themselves; and said Butler and Blaisdell, in consideration of said reduction, agreed to cultivate ratoons from all the fields of plant cane they then had, and to deliver the same at the mill of the said Tisdale for manufacture according to the terms of the grinding contracts above-mentioned; the said respondents aver that said Butler and Blaisdell and their assigns are bound to perform said contract.

Said respondent admits that said Philip Butler, by the agreement dated October 27th, 1879, agreed to plant yearly not less than forty nor more than fifty acres of cane, to be ground at the mill of said Tisdale and Thompson as alleged; and also admits that said Tisdale on the 1st day of October, 1881, made a lease

of certain premises at said Kohala, containing forty acres more or less; and that said Butler and Blaisdell therein covenanted to plant one crop of sugarcane and ratoons upon said premises, and to deliver the same to said Tisdale at his mill to be manufactured on the same terms as contained in the contract made by said Butler with said Tisdale and Thompson, and further agreed that the same should not be taken to be in lieu of the amount agreed upon in said contract of October 27th, 1879, but should be in addition thereto; and also admits that said Butler and Blaisdell made the agreement with said Tisdale dated December 6th, 1882, as alleged, but avers that the two "cane rights" mentioned in said agreement were said contract made by Philip Butler, of October 7th, 1879, and said contract made by William Paty, of January 1st, 1880, then held by said Butler and Blaisdell by assignment with consent of said Tisdale; and that said agreement of December 6th, 1882, was in modification of the two contracts last named; said respondent further avers that there are now standing and ready to come off, the following quantities of sugarcane, planted in pursuance of said contracts, viz.:

Under said contract with W. F. Paty, about seventeen acres of plant cane and five acres of ratoons.

Under said contract with Philip Butler, about sixteen acres of plant cane and fifty-four acres of ratoons.

Under said lease of October 1st, 1881, to Butler and Blaisdell, about fifty acres of plant cane.

That all of said sugar cane has been cultivated and brought to maturity by said Butler and Blaisdell, in pursuance of the various contracts above referred to, made and assumed by them; that the ratoons above referred to are ratoons from plant cane in the possession of said Butler and Blaisdell on the sixth day of December, 1882, and are the ratoons referred to in the agreement of that date; and that said Butler and Blaisdell are bound to deliver all of the plant cane and ratoons above mentioned at the mill of respondent to be manufactured into sugar, in accordance with said contracts.

Said respondent is ignorant whether said complainants have taken assignments of and now hold all of the lands, leases and contracts on and in pursuance of which said Butler and Blaisdell were planting said sugar cane; but if it is true as alleged in said bill, this respondent avers that said complainants purchased with full knowledge of all the covenants and agreements contained in said leases and contracts in regard to said sugar cane, which respondent alleges run with said lands, and that said complainants expressly covenanted with said Butler and Blaisdell to fully perform all of said contracts and all of the covenants contained in said leases, and to indemnify, hold harmless and protect said Butler and Blaisdell from all lawful claims, demands and suits which might arise from said leases and contracts, and to assume any judgment which might be given against said Butler and Blaisdell on the same.

Said respondent admits that said Chapin and Thompson in their said agreement with Tisdale and Thompson agreed to plant and cultivate upon their own land or upon land leased by them not less than seventy-five and not more than one hundred acres of sugar cane yearly, to be delivered as alleged in said bill; and avers that said Thompson is said complainant Lyman S. Thompson; that he now has ready for grinding seventy-five acres of plant cane and a large quantity of ratoons, all planted in pursuance of said contract; a portion of which has been delivered at said mill by said complainant, and that said complainant is now engaged in delivering the remainder of the same to respondent for manufacture; and respondent further denies making the claim alleged in said bill in regard to said contract; but avers that said Thompson is bound to carry out said contract, and to deliver all cane and ratoons he may cultivate in pursuance thereof up to the maximum therein named, at the mill of respondent.

Said respondent is ignorant whether said complainants now hold the premises held by said Chapin and Thompson in leasehold at the date of their said agreement, whether by assignment from Butler and Blaisdell or otherwise.

Said respondent admits that said Chapin and Thompson in their agreement with said Tisdale and Thompson further agreed to bring all the cane that during said term of ten years should be raised by them on land held by them from James Wight, P. Butler, the Kohala Sugar Company, the Independence Sugar Company, and on all other lands then held by them, to said mill of said Tisdale and Thompson, and further agreed that they would not take said cane to any other mill without the written consent of said Tisdale and Thompson.

Said respondent admits that it claims that by reason of the premises said complainant Lyman S. Thompson is bound to deliver at the mill of respondent all of the cane planted on said premises and now ready for grinding, and also that said James W. Thompson, if he has any right or title in the same, is also so bound, he having had full notice of the agreement made by said Lyman S. Thompson in regard to the same.

Said respondent further says that it is not bound to answer, and this Court will not take jurisdiction, in regard to any alleged claims as to the future or hypothetical rights of said parties under said contracts, so far as the same are not necessarily in issue in determining the rights and obligations of said parties in regard to sugar cane now ready to be taken off.

Wherefore they pray said bill may be dismissed with costs."

BRIEF OF A. S. HARTWELL AND W. R. AUSTIN, FOR PLAINTIFFS,
E. PRESTON WITH THEM.

1. The complainants claim first, that they are bound in no way by the several planting agreements, neither at law nor in equity, because the contracts were personal, calling for the skill and experience of both parties to the original contracts, and are therefore unassignable.

2. The complainants are not bound on the theory that the covenants run with the land at law, or on the principle that equity will enforce the performance of the covenants against the lands in the hands of subsequent purchasers with notice, because there is no privity of estate between these complainants and respondents in respect to the lands, and secondly because

the lands obtained under the Paty and P. Butler contract are too indefinitely described to be burdened with any trust.

3. If the Court shall decide that the contracts are assignable, or that the lands are bound in equity, the complainants contend that they have fulfilled the several contracts by delivering the minimum amount of cane, although they plant the maximum.

4. The complainants submit that the only ratoons which they are bound to deliver are the ratoons from plant cane growing on the date of December 6th, 1882, and that when those ratoons have been taken off, the Paty lands and the P. Butler lands are freed from delivering ratoons of any plant cane thereafter.

5. The complainants claim that under the Chapin-Thompson contract (contract of November 6th, 1879,) the ratoons grown from plant cane on the Wight, Butler, Kohala Sugar Co., Independence Co. and lands held by Chapin and Thompson on November 6th, 1879, can be delivered elsewhere than to the Halawa Mill, because the word "privilege" used in said contract imports nothing of an obligation.

6. That under the Paty and P. Butler contracts, the complainants are obliged to deliver no ratoons, because ratoons are not mentioned in said contract.

Argument and authorities on Point I., viz: that the contract is personal.

Chitty on Contracts, 1363, says, contracts in which the personal acts and qualities of one of the contracting parties form a material ingredient are in general not assignable. Anson on Contracts, p. 204 to the same effect. Such contracts are not assignable at law so as to give an assignee of one of the parties any rights against the other original party. *Robson vs. Drummond*, 2 B. & Ad. 303 (Coach Case.)

Nor are such contracts assignable in equity so that the *restraining process* of a court of equity can be invoked in favor of an assignee against the other original party who is undertaking to deal with a stranger after the party with whom he originally contracted has assigned his interest under the contract.

Stevens vs. Benning, 31 Eng. Law & Eq., 583.

Apply the above doctrine, viz., that the contracts are personal, to this case. A corporation is substituted as one of the contracting parties in place of an individual. The liability of the corporation is that of a joint stock company limited, with a paid up capital. If the planter is damaged by reason of the non-fulfillment of the contract, he has nothing to "pounce upon" but the mill, which if it came to a "case of pouncing," would probably be worthless. The contracts, from their very nature, call for personal skill and experience. Besides, the contracts themselves show internal evidence of personal selection. Take for instance, the Philip Butler one of October 17, 1879, as an example. The parties nowhere covenant that their assigns shall do anything, the covenant is that "the party of the first part, his heirs and assigns, covenants and agrees with said parties of the second part, their heirs and assigns, that *he* will plant, etc." Again, the cane is to be delivered at the "mill of the parties of the second part," (not at the mill of their assignees.) Again, "the parties of the second part agree to give their best care and attention to the before-mentioned carting and shipping."

The same internal evidence of personal selection is to be found in the Paty Contract of January, 1880.

These contracts relate to a joint business undertaking, and the benefits to be derived from them must be greater or less according to the personal skill and experience of the parties engaged in carrying out the contracts.

The analogy between these contracts and a contract of co-partnership seems to be perfect. No partner in retiring or selling out can thrust a stranger upon his co-partners against their will. That analogy should apply here.

Point II.

The covenants do not run with the land, as there is no privity of estate between the parties, that is, Tisdale, and consequently his assigns, the respondent, had no reversion in the leasehold assigned to the complainants, except possibly the piece of land described in the Butler and Blaisdell contract of October, 1881.

Spencer's Case, Smith's L. C. 137, and cases there cited; *Bronson vs. Coffin*, 108 Mass. 180.

Neither are the covenants enforceable in equity against a purchaser with notice, by a bill for specific performance, because they are covenants of an affirmative character. *Hayward vs. Building Society*, 8 Q. B. D., 403; *Railway Co. vs. Gomm*, 20 Ch. Div., 562.

Nor will a bill for injunction to restrain the complainants from delivering the cane elsewhere lie at the suit of these respondents (assignees also), because the contracts are personal, and the maxim "Equity follows the law" applies even though the assignments were taken with notice.

The case of *Stevens vs. Benning*, above quoted, was a case of a bill for an injunction to restrain an author from taking his book to another publisher after having contracted with the complainant's assignor. The application for the injunction was refused.

Point III.

The contracts are fulfilled by delivering the minimum amount of cane called for. The minimum claim is for the protection of the mill, the maximum for the protection of the planter by way of privilege; that is, if he wishes the mill to grind the crop up to the maximum, the mill must do it, though if he chooses to carry cane above the minimum elsewhere, he may do it. It is unjust to construe such contracts so as to compel the planter to deliver up to the maximum; the mill has protected itself by binding him to deliver the minimum; supposing the minimum is delivered to the mill at a loss to the planter owing to unfavorable terms; should he suffer additional loss by delivering up to the maximum? It is submitted that it was to meet just such a contingency that the maximum and minimum clause was put in.

No other construction can be put upon these clauses without writing some words into the contract. *Disborough vs. Neilson*, 3 Johnson's Cases, 81.

Points IV and V speak for themselves.

Point VI.

That under the Paty and P. Butler contracts the complainants are obliged to deliver no ratoons, because ratoons are not mentioned in said contract, and because the contract of December 6th, 1882, by stipulating for ratoons, is tantamount to an admission that the Paty and Butler contract called for no ratoons, etc.

The rule which shall be laid down in this case will be applicable to all cases of like contracts, so that no matter how great the reliance upon the skill, probity, pecuniary responsibility and other important personal qualifications of the contractors, all this will either be lost or secured, according as the Court shall hold that such personal selection is or is not regarded as essential or binding. Counsel for complainants submit that it is the essence of these contracts, and is binding.

DEFENDANT'S BRIEF. F. M. HATCH.

I. The Court is not called upon to determine any question but the rights of the parties in regard to the sugarcane now standing. All that was planted on the land formerly held by Paty is covered by the supplemented agreement of December 6th, 1882, signed by Butler and Blaisdell. There is no possible doubt as to what this refers. Butler and Blaisdell were undoubtedly bound to deliver all of the cane in their possession at the date of their assignment to Thompson.

II. Thompson is also bound to carry out Butler and Blaisdell's contracts in regard to cane now standing. 1st, because he exclusively agreed to in the bill of sale accepted by him and his brother from Butler and Blaisdell. They took an agreement of, and assumed the benefits and the obligations contained in said contracts. The intention of their grantors that they should be so bound is very plain. The wording of the assignment of the contracts, coupled with the covenant by Thompson, shows a complete understanding not open to construction or doubt.

2d. Complainants are bound as to the present crop merely from the fact of having taken an assignment of the various

leases with full knowledge of all the covenants in regard to the crop. Their liability does not depend on privity of estate. *Pomeroy Eq. Vol. III; Barrow vs. Richards*, 8 Paige, 351; *Whitney vs. Union R. R.*, 11 Gray, 364.

"By acceptance of deed and receiving the lease, they became bound to comply with the restriction and liable in equity to the owners." *Parker vs. Nightingale*, 6 Allen, 346.

In *Vivian vs. Arthur*, 1 Barn. & Cresw., 410, the owner of a mill and certain lands granted a lease of the land upon terms that lessee should pay rent and also do suit at lessor's mill by grinding there all the corn that should grow upon the demised land. It was held that the doing suit to the mill was in the nature of a rent reserved and incident to the reversion at common law, and that the implied covenant to render it ran with the land and the reversion, so long as the ownership of the mill and the land belonged to the same person, consequently the assignee of the reversion in both could sue upon it. *Chitty on Contracts*, p. 1390 (11th edition). In the case at bar the defendants hold the mill and the reversion of premises leased to Butler and Blaisdell by agreement of October 1st, 1881, also of the fifteen acres named in contract with Philip Butler, of October 27th, 1879; also of the fifteen acres in agreement of December 6th, 1882, all now held by complainants with notice. L. S. Thompson was a party to the Butler and Paty contracts, and is estopped to deny notice.

The assignee of a chose in action takes it subject to all equities existing between the original parties. Do. 1366.

III. The contracts were assignable and complainants are bound to defendant corporation.

All contracts and choses in action are assignable, except the small class restrained by public policy, and where personal skill and professional services are contracted for.

Devlin vs. Mayor of N. Y., 63 N. Y. 17. This was a contract to keep the streets clean. The Court say, p. 19, it was not possible to be performed by plaintiff in person. So here Tisdale did not undertake to boil the sugar himself. The whole service

was to be performed by workmen. It is absurd to say that such an undertaking as this planting contract was based on the personal skill of either party. The records of this Court show the bitter hostility of the parties.

The common law doctrine that a chose in action cannot be assigned has degenerated into a mere form which in equity is entirely disregarded. Story Contracts, p. 376A.

A Court of Equity will decree specific performance of a contract in favor of an assignee of the benefit of it. Chitty Contracts, p. 1360.

"The power to assign and to transmit to personal representatives are convertible propositions." *Bixbie vs. Wood*, 24 N. Y., 612; *Zabriskie vs. Smith*, 3 Kern., 333.

Would it be pretended that the personal representative of L. S. Thompson could not compel defendant to take and grind cane planted by him under contract of November 6th, 1879? There can be but one rule of construction, which must be applied equally to the benefits and obligations under the contracts.

Contracts for the labor of prisoners may be assigned. *Horner vs. Wood*, 23 N. Y. 355.

The three principal contracts are made in favor of the heirs, executors, administrators and assigns of the parties of the first and second parts. This was not commented on by complainants' counsel. It is most earnestly urged that this is decisive of the whole question. The Court cannot make a new contract for the parties. To support the contention of the complainants, not only must new terms be interpolated, but the express terms must be disregarded, which cannot be done. See *Chapin vs. Tisdale*, 5 Haw., a case arising out of one of these very contracts.

IV. Relief prayed for cannot be granted. An injunction will not be issued to restrain a suit in equity. High on Injunctions, § 52. Nor to restrain an action at law unless such action is brought and pending, and then only for the well-known grounds, none of which are shown by this bill. High on Injunctions, Sec-

tions 45 and 64. *Wagon Co. vs. Lea*, L. R. 5 Q. B. Div., 149. This case materially limits the coachmakers' case, *Robson vs. Drummond*, 2 B. and Ad., 303, cited by plaintiff.

The question is of immense interest to all of the sugar planters and mill owners in the country.

BY THE COURT.

The Court is asked by both parties to give "an intimation" of its views upon the effect of the contracts, in view of the assignments which have been made of the mill property and grinding contracts on the one part, and of the planting side of the contract on the other. The proceeding may be treated as an amicable one to obtain construction, and to prevent further litigation. I do not understand that either party is charged by the other with having yet violated its obligation towards the other. The defendant holding the mill property is ready and desirous to take the cane and ratoons as contracted for with the plaintiffs' assignees, and the plaintiffs have not yet taken them to any other mill.

I am of opinion that the plaintiffs' prayer for injunction to restrain defendant from prosecuting or bringing actions at law cannot now be granted upon the mere apprehension or fears of future actions. High on Injunctions, Section 64. Neither can there be an injunction against suits in equity. *Id.*, Sections 45, 52 and 64.

Upon the question of the assignability of contracts on the one part to grow cane, and on the other to grind it, as being within the description of contracts made upon personal choice of the parties respectively, there are certain strong and reasonable considerations why the view should be taken that such contracts are not of unassignable character, if that view can be supported on principle and by authority. It is a supposable case that a sugar mill be established that shall be entirely dependent for its business on cane planted on contracts with its owner, and that it be established on the faith of such contracts made previously. A large amount of capital is held invested for many years. It would be an unfortunate position if the owner of it could

not sell it to other parties, could not alienate to a corporation, or that upon his death the contracts for cane upon the execution of which the profit and the value for the most part of the buildings, machinery and everything constituting the mill plant, should become invalid. So of the contract to plant cane. It involves a large outlay. I take the case of its being entirely dependent for realization on grinding at the mill with the owner of which it contracted. It would be equally unfortunate if a change of ownership was for any reason desirable or necessary, or made by act of law, or by act of God, through death, that the property should become of no value in the hands of assignees or heirs.

But I have no doubt, on principle and authority, that such contracts may be assigned on both parts. On the part of the mill owner the contract was to receive the cane at the mill and manufacture it into sugar and molasses. No part of this can be supposed to be done by the personal labor of Dr. Tisdale, who contracts for it. It is done by his employees. One of the most important of these is the sugar-boiler, yet it will not be claimed that the contract contemplated that the sugar-boiler then employed should be retained during the entire term of the contracts, or that Dr. Tisdale was not at liberty to make such changes as to him and as to any of his employees who must execute the work, as he saw fit or might be necessary. In saying this I do not overlook the choice, the selection for personal qualities of such mill owner, by the cane planter, which may have its influence in the first instance. Yet it is reasonable to hold that such choice must be made subject to the contingencies of a change of ownership in the course of a term of years.

The plaintiffs on this point cite the leading case of *Robson vs. Drummond*, 2 B. and Ad., 303, wherein a contract to furnish the defendant with a coach for five years, and keep the same in good order, was held not assignable. In a recent case, *British Wagon Co. vs. Lea*, Law Reports Q. B., Vol. V., 149, January 13th, 1880, the Court per Lord Cockburn, C.J., say of that case: "We entirely concur in the principle on which the decision in

Robson vs. Drummond rests, namely, that when a person contracts with another to do work or perform service, and it can be inferred that the person employed has been selected with reference to his individual skill, competency or other personal qualification, the inability or unwillingness of the party so employed to execute the work or perform the service, is a sufficient answer to any demand by a stranger to the original contract of the performance of it by the other party, and entitles the latter to treat the contract as at an end, notwithstanding that the person tendered to take the place of the contracting party may be equally well qualified to do the service. Personal performance is in such case of the essence of the contract which, consequently, cannot in its absence be enforced against an unwilling party. * *” The Court saying that the principle did not apply to the case before it, says: “While fully acquiescing in the general principle just referred to, we must take care not to push it beyond reasonable limits. And we cannot but think that in applying the principle, the Court of Queen’s Bench in *Robson vs. Drummond* went to the utmost length to which it can be carried.” *Devlin vs. Mayor of New York*, 63 N. Y., 17, supports the assignment of a contract to sweep the streets of the city, the Court saying: “Parties may in terms prohibit the assignment of any contract, and declare that neither personal representatives nor assignees shall succeed to any rights in virtue of it, or be bound by its obligations. But when this has not been declared expressly or by implication, contracts other than such as are personal in their character, as promises to marry or engagements for personal service requiring skill, science or peculiar qualifications, may be assigned, and by them the personal representatives will be bound.”

The observations made upon the assignability of the contract to grind cane will apply with equal propriety to the contract for growing cane. It is a common business, the most prevalent agriculture of this Kingdom. Perhaps one man may cultivate better than another, but there are no secrets in the business. The cultivators may be employees, and are liable to be changed,

without affecting the force of the contract in anywise. See *Munsell vs. Lewis*, 2 Den., 224, which supports assignment of contract for repair and construction of canals, a business probably involving more scientific skill and special experience than cane culture. In contracts of the kind we are considering, the interests of both parties are in unison, for it is equally the interest of the cane planter to produce good cane of which he is to have one-half the proceeds, and of the mill owner to make the most and best sugar of which he receives the half, so that both parties are bound by the same interest to the proper performance of their contract.

I hold, therefore, that these contracts do not come within the class of those which cannot be assigned, because depending on personal qualities of the original contractors. It will be seen further that they have been made expressly assignable by their terms.

The first of the planting contracts is that of October 27th, 1879, between Philip Butler, the planter, and T. P. Tisdale and L. S. Thompson, the mill lessees. This was assigned by Butler (and Blaisdell) March 1st, 1883, to these plaintiffs. The contract is that the party of the first part, his heirs and assigns, covenants and agrees with the party of the second part, their heirs and assigns, that he will yearly and every year until the first day of January, 1877, plant and cultivate in the district of North Kohala, Island of Hawaii, not less than forty nor more than fifty acres of sugarcane. * * The parties of the second part agree to furnish the parties of the first part sufficient land not more than two miles from the mill, to plant fifteen acres of land for and during the full term of this agreement; * * the remainder of the thirty-five acres of cane is to be grown on the lands of the party of the first part. * * Rent at \$3 per acre per year is to be paid for fifteen acres, the time to be computed from the time the land is apportioned until the cane is taken off and the land returned to the lessors.

The contract of Tisdale with Butler and Blaisdell of October

17th, 1881, provides that Butler and Blaisdell shall plant one crop of cane between May and October, 1882, on the whole of a certain described piece of land containing forty acres, more or less, the cane with its ratoons to be delivered at the Halawa Mill, to be ground on the same terms as set forth in the contract of Butler with Tisdale and Thompson of October 27th, 1879. A yearly rental of \$3 per acre is to be paid by Butler and Blaisdell. It is stipulated that this contract shall not be considered a part of, or in lieu of, but in addition to the former contract. This contract was assigned to the plaintiffs by the plaintiffs by the same instrument of March 1st, 1883.

My view upon these contracts in respect to the several points raised, is that the cane planted, and the ratoons grown upon the land of the mill owners, rented from them, is bound by the contracts. The assignees are in the position of tenants, bound not only to render the \$3 per acre, but the cane and ratoons upon shares to the lessors. This finding is limited in its application to the cane and ratoons now standing on the leased lots of fifteen and forty acres, without extension to obligation to take land or plant future crops.

The contract of October 27th, 1879, calls for "not less than forty nor more than fifty" acres to be planted. Deducting the fifteen to be furnished by the mill owners, there was to be not less than twenty-five nor more than thirty-five acres planted by Butler in the district of North Kohala, on their own land for the Halawa Mill. I am of the opinion that the assignees of this contract are bound to deliver the cane of the minimum extent, of the crop of cane or ratoons which has been planted or grown in pursuance of this contract and passed to them by the assignment. Such is the most direct interpretation to be given to its terms, and I see nothing to support any other view. A contract may be optional with one of the parties, in part or in whole, and obligatory on the other. *Giles vs. Bradley*, 2 Johnson's Cases, 254; *Disborough vs. Neilson*, 3 Johnson's Cases, 81.

Contract with Chapin and Thompson by Tisdale and Thomp-

son, made November 6th, 1879, provides that Chapin and Thompson, their heirs, successors and assigns, will plant and cultivate for Tisdale and Thompson, their heirs, successors and assigns, upon their own land not less than seventy-five acres and not more than 150 acres of sugarcane yearly, and each year for ten years, this amount of cane each year, irrespective of ratoons, and will deliver at their own expense at the Halawa Mill, "all of said sugarcane and ratoons grown upon said land."

* * Chapin and Thompson covenant and agree that they will during the term, bring all of the cane raised by them on the land held by them under lease from Dr. James Wight, and J. Butler and Independence Co., and on all other lands now held by them under lease or under agreement of lease, to said mill of Tisdale and Thompson, and that they will take said cane to no other mill without written consent of Tisdale and Thompson. And it is further agreed and understood that the parties of the second part have the privilege of growing ratoons on all lands planted by them according to this contract, and the parties of the first part agree to manufacture the same into sugar the same as the above mentioned cane.

As to this contract one of the original makers, L. S. Thompson, is one of the plaintiffs. The assignees of the grinding contract hold themselves ready and demand performance. Having above expressed the opinion that such contracts are assignable on the mill part, I further see no reason why the substitution by assignment of James W. Thompson for Chapin affects the obligation of the contract upon the two plaintiffs or either of them. The assignment to James W. Thompson, or substitution, seems to be assumed as a fact and not contested, but I do not observe evidence of it. Two questions of construction of the extent of the contract are raised.

1. Does it bind the planter to deliver such ratoon cane as he raises. The plaintiffs claim that the word "privilege" used imports an option only, and no obligation. Ratoons are mentioned in the first part of the contract where it is stipulated that the planters "shall plant this amount of cane each year,

irrespective of ratoons," the force of which is to secure a certain amount of plant cane each year, and that ratoon crops should not be taken in to make that area. Secondly, the planters agree that they will deliver all of said sugarcane and ratoons grown upon said land to Halawa Mill. Thirdly, it is stipulated that they have the privilege of growing ratoons on all the lands they plant pursuant to this contract, and that the mill will grind them upon the like terms with plant cane.

By the common rules of construction the intention of the parties is to be gathered from all that they say upon any subject. Taking the above expressions together, the most direct and consistent meaning to be given them is that the mill is secured a certain area of plantcane every year, and that the planter may grow his ratoons to the extent he pleases, but is bound to deliver this optional quantity, whatever it may be, to the mill, and the mill is bound to grind the same.

The second question of construction is as to the quantity of plantcane for which the plaintiffs are holden. By one stipulation it is to be the crop of not less than seventy-five acres and not to exceed 150 acres planted every year, and by another they are bound to deliver all that they plant on certain leased lands mentioned, and on all other lands now leased or held under agreements for lease.

There is no evidence to show the area of the land held by the contracting planters at the date of this contract. I hold that the force of the two stipulations taken together is that at least seventy-five acres is to be planted in cane each year, but that if more is planted on these lands, the mill is entitled to it and bound to grind it up to the extent of 150 acres: the indefinite stipulation of all the cane which may be grown on the lands being controlled by the definite maximum limit.

What is known as the Paty contract was made January 1st, 1880, between Wm. T. Paty and Thompson and Tisdale, their heirs and assigns, for seven years. The agreement is to plant and cultivate yearly in the district of North Kohala, Island of Hawaii, on lands owned, leased or contracted by Paty, not less

than twenty-five nor more than forty acres. The Paty contract was assigned to Butler and Blaisdell August 25, 1881, and by them assigned March 1, 1883, to the plaintiffs, and by the same assignments also were assigned the leases of the lands held by Paty, of which a description is given from which the premises may be definitely ascertained.

There is a brief supplemental contract of date December 6th, 1882, between Butler, Blaisdell and T. P. Tisdale, in these terms: "It is mutually understood by the undersigned that Butler and Blaisdell will plant in 1883, forty acres of cane, Butler and Blaisdell agreeing to furnish fifteen acres of land in field makai mill adjoining Dr. Wight's store. It is further understood that in lieu of balance of sixty-five acres that Butler and Blaisdell's two cane rights call for, they have the privilege and agree to ratoon all their plantcane now growing."

The defendants counsel contends this supplement must be held to refer to the Paty contract, and the Philip Butler contract.

I think it cannot refer to the Butler and Blaisdell contract of October 1st, 1881, (1) because that plainly provides that ratoons may be raised, and therefore requires no new consideration to give that privilege; (2) because the sixty-five acres spoken of would be made by the sum of the minimum twenty-five acres of the Paty contract and the minimum forty acres of the Butler contract; (3) and there were no other contracts between the parties to which reference could be made to which this specification would conform. I therefore find it as a fact that the supplement qualifies the Paty and Butler contracts.

And I find that the plaintiffs are bound by the assignment to deliver the cane and ratoons of the Paty contract planting, as qualified by the supplemental contract. This takes the minimum of the two contracts to which it must refer, and stipulates for the ratoons of the plantcane then growing, which must be taken to be of the previous planting under the Butler and Paty contracts, and not relating to the forty acres therein agreed to be planted in 1883, nor, as has been observed, to the ratoons of the Butler and Blaisdell contract of October 1st, 1880.

I believe I have now covered all the matter presented for adjudication. It does not seem to me to be necessary to extend the terms of this decision beyond such cane and ratoons now standing as came within its effect.

As both parties agreed in argument to ask simply the intimation of the Court upon the force of the contracts, as now held by assignment, I will not, without further hearing, make any decree.

April 1, 1884.

Upon further hearing of the counsel, the Court being asked to make some rulings more explicit, makes the following summary of its findings.

The Court is of opinion that the contracts are assignable by both parties, and enforceable by the assignees of one party against the assignees of the other party.

Secondly. That under the Tisdale-Thompson and Chapin-Thompson contract, the plaintiffs must deliver 150 acres of plantcane (the maximum) if planted by them, and also all the ratoons, because of the general clause binding the planters to deliver at the mill of Tisdale and Thompson all the cane grown on certain enumerated lands.

Thirdly. That they are not obliged to deliver the ratoons from the sixty-five acres planted under the agreement of December 6, 1882.

Fourthly. That the plaintiffs must deliver the crop of plantcane and the ratoons therefrom from the fifteen acres of land leased by the mill to the planters under the Philip Blaisdell and Tisdale contract of October 1, 1881.

The special prayers of the bill, as well as other relief being thus denied, and the finding being that the defendant has, to the extent above defined, foundation for his claims, the bill is therefore dismissed with costs.

Honolulu, April 1st, 1884.

J. K. HANUNA *vs.* A. UNNA.

EJECTMENT. BEFORE JUDD, C.J.

APRIL TERM, 1884.

A tenant by curtesy has the right to lease the land inherited by his children from their mother, until the children become of age.

A father, as such, has no authority to lease his children's land.

Upon the majority of the children, a notice to quit must be given by tenant by curtesy, as a pre-requisite to a suit.

DECISION OF JUDD, C.J.

This is an action of ejectment to recover possession of some fourteen acres of land at Hana, Island of Maui, described in Royal Patent No. 4878, to Kaihe. The plaintiff disclaims as to seven 18-100th acres, being the mauka half, which he admits is held by the defendant under a lease for twenty years from Kaihe, the patentee, dated September, 1866.

As to the remaining half, plaintiff claims title under a lease for eight years from the 10th of October, 1883, dated the 28th of March, 1883, recorded the 26th of May, 1883, from Kailinoe (w.) and her husband Wm. Needham, and Kaanaana, the heirs at law of Kaanaana 1st, deceased, the grantee of Kaihe by deed dated October 24, 1866.

It is in evidence that Kailinoe, lessor of plaintiff, was born in 1864, of the parents Kaanaana 1st (w.) and Kalawa, and that Kaanaana, the other lessor of plaintiff, was born March 15th, 1866. This last-mentioned person therefore came of age on the 15th of March, 1884. The defendant holds by virtue of a lease from said Kalawa, made on the 9th of December, 1880, for the term of ten years from the 10th of October, 1883, a former lease from the same party having expired on the 10th of October, 1883.

Kalawa was entitled to an estate by the curtesy in the land which his children Kailinoe and Kaanaana inherited from their

mother, Kaanaana 1st, deceased. See Section 1286 of the Civil Code.

His lease to the defendant was, therefore, good until the children severally became of age.

But it is urged that, by Section 1288 of the Civil Code, the lease of the father, who is by this law the natural guardian of the persons and property of his children, is good during their minority and beyond this period unless disaffirmed by the minors on arriving at majority.

A father has no authority as such to lease his children's lands. 1st Wash. Real Property, p. 307, Ed. of 1860.

I think that a lease of the land to a third party and notice to quit by him is a sufficient disaffirmance by the heirs of Kaanaana 1st, of the lease to defendant.

The lease of the tenant by the curtesy, defendant's lessor, expired as to one undivided half of the land, on the attaining of the majority of Kaanaana in 1882. A notice to quit was necessary as a pre-requisite to the suit. This was not given until early in October, 1883.

The estate of the defendant's lessor of the remaining half (Kailinoe's) of the land had not expired when the suit was begun.

Judgment must therefore be for the plaintiff for one undivided half of the makai seven acres; as to the other half, the suit was premature.

Damages \$1.

W. R. Castle, for plaintiff.

C. Brown, for defendant.

Honolulu, April 30, 1884.

KAHUAKU *et al.* vs. UNION MILL CO. *et al.*

EJECTMENT. BEFORE McCULLY, J.

MAY, 1884.

Cousins of the whole and half-blood held to have title to land, in spite of their failure to assert it for a long time.

Defendants having acquired possession without notice of plaintiffs claim, nominal damages only are awarded.

DECISION OF McCULLY, J.

The land in question, situated at Kohala, Hawaii, is a grant to one Wahakuli (w.), deceased intestate. The plaintiffs claim eight-ninths undivided interest, and damages, as being the collateral heirs of the Crown grantee. The defendant Mill Company holds sixty acres by a deed from Kamaka (w.), who is shown to be a sister of Kahuaku and Ahukinialaa, two of the plaintiffs. The other defendant is Kaikuahine, husband of the said Kamaka who is now divorced, these two defendants holding in common without division.

The relationship by which plaintiffs claim is, on the part of the three plaintiffs who have been named, that they are the children of Nahua, who was a cousin of the grantee. Another plaintiff, Wahine (k.), claims as cousin of the grantee by the half-blood, and two others, Kaheana and Kaikiumi, claim as the children of Palua, another cousin of the half-blood. These are all inheriting relationships, the kindred of the half-blood inheriting equally with those of the whole-blood in the same degree, except in cases where the inheritance came to the intestate by descent, devise, or gift from some ancestor, when the descent is confined to the blood of such ancestor, which is not the case here. See Section 1454 of the Code.

The patentee, Wahakuli, died in July, 1865, leaving a husband, Kaikuahine Sr., a nephew of the husband, who is the Kaikuahine, defendant, and had lived with them as a "keiki."

He married Kamaka, and they appear to have remained in possession of the premises, without claim on the part of heirs of Wahakuli, Kamaka selling sixty acres, as above, and Kaikuahine and the Union Mill Co. now holding in common. The plaintiffs testify that the reason for their not asserting the claim of heirship is because the property had rested in possession of Kamaka, their sister and cousin, and her husband, Kaikuahine, who was also one of the family, and had been considered a "keiki hanai," or adopted son of Wahakuli, and that Wahakuli had given them the land by "Kauoha," or oral bequest to these parties, a form of devise which still carries influence with Hawaiians, but that these considerations had now failed in consequence of the sale to outside parties, and the divorce of Kamaka, leaving the land in possession of strangers.

The testimony offered by the plaintiffs is of the quality and amount which is usually presented in the establishment of Hawaiian relationships. In the absence of controversy it would prove the claim. The evidence per contra does not, in my opinion, preponderate. It depends on establishing as fact that Wahakuli and her family belonged to the district of Hana, Maui, and emigrated to Kohala, and that she was not the daughter of one Kailaa. There are inconsistencies and improbabilities in the testimony for the defence which discredit it; moreover the defendants' best witness, in cross-examination, supports plaintiffs' case. It is easier to accept the theory that the emigration from Maui was the return from a visit of perhaps extended length, and that the family belonged to Kohala.

I think it may well be considered, too, that the defendant as to three-fourths of the land, the Mill Co. holds by the title which the plaintiffs support.

Its possession is recent and its only color of title is the deed from Kamaka, whose title is one with that of the plaintiffs in her proportion thereof. Kaikuahine shows no right. He has remained by suffrance since the death of the patentee and her husband.

I shall find for the plaintiffs.

As to damages. The defendants have had no notice before that given prior to bringing this suit that the plaintiffs had a claim on the land. They have not kept them out of it previously. The principal defendant bought of a party in possession, whose rights had never been called in question by the other heirs. She was an heir, and the plaintiffs allowed it to be considered by the world that she was the sole heir.

I give the slight or nominal sum of twenty-five dollars, for which, as well as the costs, the defendants are liable jointly and severally.

The plaintiffs are adjudged to be entitled as follows:

Wahine (k.) to one-third; Kaheana to one-sixth; Kaikiumi to one-sixth; Kahuaku to one-ninth; Ahukinialaa to one-ninth; leaving one-ninth interest in the defendant Union Mill Company, the grantee of Kamaka, who was entitled to so much.

Let judgment be entered accordingly.

W. R. Castle, for plaintiffs, *E. Preston*, also.

Cecil Brown and *J. L. Kaulukou*, for defendants.

Honolulu, May 1st, 1884.

KEAWE *vs.* S. PARKER *et al.*

IN EQUITY. BEFORE JUDD, C.J.

MAY, 1884.

Defendants held to be trustees for plaintiff as to certain lands purchased by them: the facts as to plaintiff's claim being such as to put defendants on enquiry, and to constitute notice in equity.

Such a trust can be proved by parol and is not within the Statute of Frauds.

DECISION OF JUDD, C.J.

This is a bill in equity to declare and execute a trust. It is as follows: "Your orator Keawe, residing at Hamakua, on the Island of Hawaii, humbly complaining, sheweth unto your

Honor that heretofore, to wit, during the year 1852, certain persons, to wit, Napeahi, Nohoikahiki and Luheluhe, residing at Hamakua aforesaid, made application to the Hawaiian Government for the purchase of certain Government land situated in Hamakua aforesaid, through one Rev. L. Lyons, residing at Waimea, on the island aforesaid, the then duly authorized agent of the Government for Hamakua aforesaid, it being understood and agreed between the land agent and the applicants aforesaid, that the title to said land was not to pass nor a patent therefor to be delivered to the applicants until the whole of the purchase money and fees, to wit, \$72, had been paid over by the said applicants to the Hawaiian Government. That said applicants paid over a portion of the purchase money, but thereafter, to wit, for the space of three years or thereabouts, said applicants neglected and failed and were unable to pay the balance thereof.

That thereupon the agent aforesaid informed said applicants that unless said purchase money was paid in forthwith, that the land aforesaid would be sold to another, to wit, to Mokuola.

The said applicants therefore made application to one Kaiwi, residing in Hamakua aforesaid, for the loan of money sufficient to pay the balance then due upon said purchase money, to wit, \$48, then and there promising the said Kaiwi that in consideration of said loan, he should be let in as a purchaser with them; that his name should appear in the patent therefor, and that his share of the land should be in proportion to the amount of money he had paid in; that the said Kaiwi, induced and relying on the promises aforesaid, advanced the balance of the purchase money due as aforesaid, and therefore, to wit, in the year 1855, the patent therefor, to wit, Royal Patent (grant) No. 940 was delivered by the Government to said applicants; that in pursuance of said agreement said applicants requested the land agent to have the name of said Kaiwi inserted in the patent aforesaid, but the land agent aforesaid said it could not be done as the patent had already been made out.

That after the delivery of the patent as aforesaid and in

pursuance and execution of said agreement, the mauka portion of the purchase land was set apart to, and thereafter was continuously and exclusively occupied by, the said Kaiwi, the dividing line between his portion and that of his fellow purchasers being, however, then unascertained.

That during the year 1866 two of the original applicants having died intestate, to wit, Napeahi and Nohoikahiki, and the said Kaiwi being desirous of securing his title to said land more fully, applied to the survivor of said applicants, to wit, to Luhe-luhe and also to one Kaiawa, son and reputed sole heir of the said applicant Napeahi and Nohoikahiki elua, nephew and reputed sole heir of said applicant Nohoikahiki, to execute a deed of conveyance to said Kaiwi, of the land set apart to him as aforesaid in execution of said original agreement. That in compliance with said request said Kaiwi's share, according to the terms of said original agreement, was ascertained and surveyed by one Solomon Lolo, (which said partition, your orator alleges, was a just and equitable one in all respects) and therefore, to wit, August 25th, A. D. 1866, a deed for the land surveyed and set apart as aforesaid was executed and delivered by said Luheluhe and Kaiawa and Nohoikahiki elua to said Kaiwi, which deed is recorded in the Registry of Deeds in Honolulu, on the Island of Oahu, in book 25, page 352.

That thereafter, to wit, on the 25th day of August, A. D. 1866, the said Kaiwi conveyed his said share to one Kahoohua by deed recorded in said Registry in book 25, pages 353 and 354.

That thereafter the said Kahoohua deceased intestate, leaving one D. W. Keliiaa, of Hamakua, aforesaid, as his sole heir-at-law, who conveyed the said land to your orator by deed dated April 14, A. D. 1880, and recorded in said Registry in book 75, pages 3 and 4.

That the said Kaiwi and Kahoohua and D. W. Keliiaa and your orator have successively cultivated and improved, and made large expenditures and built upon the land in question, and have had sole and exclusive possession and enjoyment of the same from said year 1855 continuously hitherto.

That your orator is now informed and believes, and so avers upon information and belief, that the said Kaiawa and Nohoikahiki elua, who executed said deed to Kaiwi as sole heirs respectively of said Napeahi and Nohoikahiki, were not such sole heirs, but that said Napeahi also left as heirs-at-law besides said Kaiawa three other sons, to wit, said Nohoikahiki elua, Kalio and Wailoa, and that the said Nohoikahiki left as heirs-at-law besides said Nohoikahiki elua the said other three sons of Napeahi, and a widow, to wit, Malanikapu.

And your orator charges that Samuel Parker, S. B. Kaalawamaka, of said Hamakua, and the Honokaa Sugar Company, a corporation incorporated under the laws of the Hawaiian Islands, defendants, have severally succeeded to and now represent and claim and possess all the pretended rights of all the heirs of said Napeahi and Nohoikahiki in and to the land purchased by your orator as aforesaid in manner following, viz: that the said Samuel Parker has purchased the same of one Kuakini (who purchased the same of said Malanikapu) all her, the said Malanikapu's, right, title and interest in the land purchased by your orator as aforesaid; that the said S. B. Kaalawamaka has purchased of said Nohoikahiki elua and Kaiawa and Kalio all their right, title and interest therein; and that the said Honokaa Sugar Company has leased and now leases the claim purchased by said S. L. Kaalawamaka as aforesaid, and further has purchased in its own right from one S. P. Kane, who purchased of said Wailoa, all his, the said Wailoa's, right, title and interest in the land in question. Your orator charging that all of said defendants and all intervening purchasers well knew before purchasing as aforesaid all the matters and things herein alleged or sufficient thereof to charge them with notice.

And said defendants now threaten to bring ejectment suits against your orator for the recovery of portions of the land purchased by your orator as aforesaid, pretending that said original agreement between said applicants and said Kaiwi was invalid, of no effect, and that said deed between Luheluhe and others to the said Kaiwi was invalid and binding neither upon the said heirs who executed, nor those who did not execute the same.

Whereas your orator charges that all of the said original applicants and heirs, and the defendants and all intervening purchasers, received the legal title of said deceased applicants to the land in question, in trust and for the use of your orator.

Therefore your orator prays that this Honorable Court do declare said trust, and do adjudge and decree that said defendants do severally execute the same, and further do execute and deliver a good and valid deed of conveyance of their several interests in the premises in question to your orator, and for costs and such other and further relief as to justice may appertain.

And in order to the above, your orator prays the process of this Court to issue, citing said defendants to appear and answer this complaint, and to be bound by all proceedings had herein.

And your orator as in duty bound will ever pray, etc."

I think it is well proven by the evidence that in 1852, three native Hawaiians, Napeahi, Nohoikahiki and Luheluhe, negotiated with the land agent of the Government, Rev. L. Lyons, for the purchase, at the rate of one dollar per acre, of a piece of land at Ahualoa, Hamakua, Hawaii, consisting of about sixty-nine and one-half acres. A Royal Patent was made out accordingly, but the applicants not being able to raise all the purchase money, procured \$48 from one Kaiwi to make up the amount, and agreed with him that he should have of this land the proportion which the money paid by him bore to the whole amount, which was fixed at forty-four and one-half acres, the three patentees having twenty-five acres. The money, \$73.50, was then paid to the land agent and the patent No. 940, was delivered to the applicants, August 27th, 1855. The land was not particularly valuable at that time nor until 1876, when cane planting was begun in the neighborhood. Kaiwi cultivated part of this land with various crops of kalo, etc., on the mauka part, and there is evidence that he had a house on it, and that Keliiaa and others, succeeding to his interest, continued to live upon it and cultivate it, with some interruption, up to the time when the Honokaa Sugar Co. plowed the land up for cane planting about two years ago.

In 1866, after the death of Napeahi and Nohoikahiki, a deed was drawn up by Naiapaakai, then Circuit Judge, he taking his instructions from Luheluhe and Kaiwi, of which the following is a translation.

"Know all men by this paper, we, whose are the names called Luheluhe (k.), Napeahi and Nohoikahiki, the persons whose is the purchased land in Royal Patent No. 940, of a number of acres ($69\frac{1}{2}$) Ahualoa, at Hamakua, Island of Hawaii, Hawaiian Islands, and for the money that Kaiwi, of Ahualoa, advanced to us at the time of the buying of this land, forty-eight dollars in full, therefore, in order to discharge this money of Kaiwi's, we agree to transfer (hoolilo) to him *the* forty-four and a-half acres ($44\frac{1}{2}$ a.) and by this paper we do convey (or transfer) absolutely that piece of land for him and for his heirs and his assigns for time unending.

And we do bind ourselves and our heirs and assigns to perform all these things.

Done with our hands at Ahualoa, this 25th day of August, 1866.

LUHELUHE,
NAPEAHI, by Kaiawa,
NOHOIKAHIKI, by the heir,
NOHOIKAHIKI the second.

Done before me,

NAIAPAAKAI.

On this 25th August, at Hamakua, Hawaii, Hawaiian Islands, Luheluhe did and acknowledged his agreeing voluntarily in the conveying the land above mentioned, for Kaiwi, and to Kaiawa, the heir of Napeahi and Nohoikahiki, afterwards is to be acknowledged his agreeing voluntarily, therefore I do certify this was done properly.

D. K. NAIAPAAKAI,
Circuit Judge."

It will be seen that of the original patentees, only Luheluhe signed the deed.

Kaiawa, who signed as the heir of Napeahi, is shown to have been a minor at the time, and he had other brothers, and more-

over he disaffirms this act by his deed to Kaalawamaka; Nohoikahiki 2d was evidently not present before the acknowledging officer, and did not sign. However ineffectual the deed was, so far as the interests of Napeahi and Nohoikahiki are concerned, it was, in my opinion, an attempt to execute the agreement originally made between the patentees and Kaiwi. The deed has the effect also of evidence to show that such an agreement was made, and that Kaiwi advanced \$48 of the purchase money.

The proofs *aliunde* show that the patentees held the land in trust, as to forty-four and one-half acres, for Kaiwi, whose interest is now held by the plaintiff, Kaiwi having conveyed to Kahoohea by deed dated August 25, 1866, and recorded in Liber 25, pages 353-4, and on the death of Kahoohea intestate, D. W. Keliiaa, his son, inherited the estate, and sold to the plaintiff, by deed dated April 14th, 1880, and recorded in Liber 75, pp. 3 and 4.

There was a great deal of evidence taken on the question as to whether the various purchasers had notice of the claim of Kaiwi to this land. Much of this is untrustworthy, especially that of Amona and Kalio, sons of Napeahi, sworn on behalf of the defense. These young men contradict themselves so completely as to be altogether unworthy of credit.

I think, however, that the defendant, Kaalawamaka, is shown to have had actual notice of Kaiwi's claim when he purchased from the sons of Napeahi. This deed bears date the 1st May, 1883, and is recorded in Liber 72, on pages 473 and 474.

The testimony as to actual notice of Kaiwi's claim to Samuel Parker, who claims an interest in this land by a deed from Kua-kini, who purchased the interest of Nalanikapu, the widow of Nohoikahiki, is not satisfactory to me. So also I am not convinced that S. P. Kane, who bought the interest of Wailoa, another son of Napeahi, by deed dated 4th May, 1882, recorded in Liber 77, pages 155 and 156, had actual notice. The four sons of Napeahi, Kaiawa, Amona, Kalio and Wailoa, all claim to be also nephews and heir of Nohoikahiki, their mother being Nohoikahiki's sister, and their several conveyances above referred

to include the interests derived from both Napeahi and Noho-ikahiki.

Actual notice is not shown to have been given to W. H. Rickard, who is S. P. Kane's grantee, by deed dated the 4th May, 1882, nor to the Honokaa Sugar Co. (defendant), who purchased Rickard's interest by deed of January 4th, 1884.

If the defendants are *bona fide* purchasers, without notice of the claim of Kaiwi, they are protected, according to well settled principles and by the statutes of this Kingdom.

It is claimed by the plaintiffs that the naked possession of Kaiwi was sufficient to charge defendants with notice, according to *Maule vs. Waihee Sugar Co.*, 4 Hawaiian, 637. I do not think the acts of possession were sufficiently prominent to put purchasers on their inquiry. The land was unfenced, and uncultivated, except at intervals. There was nothing to mark the boundaries of the land prominently, and moreover, Kaiwi had other land in the neighborhood, and it might be supposed that he was living on it. But it is urged that the deed of 1866, executed by Luheluhe to Kaiwi, was sufficient to affect purchasers with notice. The general rule is that possession is referred to the record title and the purchaser will not be affected with notice of any undisclosed equity or title which the purchaser may have. Wade on Notice, Sec. 297. But it is urged, and with convincing force, that the recital in the deed under consideration disclosed the subsisting equity sufficiently to put purchasers upon inquiry.

It recites as the consideration of the conveyance "the money, (forty-eight dollars) which Kaiwi, of Ahualoa, advanced to us at the time of buying this land, and in order to discharge or pay this money of Kaiwi's, that the patentees agreed to transfer to him the forty-four and one-half acres." I think this language being in a recorded deed, is sufficient to apprise intending purchasers of the same land of the right claimed by Kaiwi, and they took the risk of their purchase being defeated by the enforcement of this right and to the extent of the right.

See Wade on Notice, Chap. IV. Title, Notice from Title

Papers. The recital here would lead to knowledge of the real transaction.

In *Sigourney vs. Mann*, 7 Conn., 324, it is said that "Whatever is sufficient to put a person on enquiry is considered in equity as conveying notice."

I find a trust here, resulting from the acts of the parties, the estate being purchased in part by Kaiwi, with his own money, and the title in the Royal Patent being in the name of the original applicants.

See Perry on Trusts, Secs. 124, 125, 126 and numerous cases there cited.

That such a trust can be proved by parol is not doubted, and is not affected by the Statute of Frauds, though not specially excepted in the statute. 1 Perry Trusts, Sec. 136.

And it may be so proved even after the death of the nominal purchaser. *Id.* Sec. 138.

I find, therefore, that the defendants herein are trustees for the use of Keawe, the plaintiff, of 44½ acres of the mauka part of the land described in Royal Patent No. 940 of Government grants, and direct them to execute conveyances accordingly.

W. A. Kinney, for plaintiff.

C. Brown, for Samuel Parker.

R. F. Bickerton, for Honokaa Sugar Co.

W. C. Holokahiki, for Kaalawamaka.

Honolulu, May 10, 1884.

JOHN MCKEAGUE *vs.* M. NEISSER, *et al.*

IN EQUITY. BEFORE JUDD, C.J.

MAY, 1884.

The sale of a sugar plantation set aside: it appearing that the grantor was of weak mind, that false representations were made by the grantee, and that there was a failure of consideration.

DECISION OF JUDD, C.J.

The bill before me was filed January 24, 1884. As amended it alleges in substance:

1. That on the 9th April, 1881, John McKeague was possessed of an estate at Heeia, Koolaupoko, Island of Oahu, comprising a valuable sugar plantation.

2. That on the 12th February, 1879, the said McKeague received a severe injury by a fall from his horse, by reason of which his mind became impaired to such an extent as to render his intellect incoherent and his judgment defective so as to unfit him for the transaction of business.

3. That on the 9th of April, 1881, while McKeague was weak and of unsound mind, as above set forth, one Moritz Neisser, who well knew plaintiff's weak and unsound mental condition, fraudulently persuaded and prevailed upon him to enter into a certain agreement in writing as follows:

* * * * *

This was acknowledged before Cecil Brown, notary, on the same day. The agreement referred to as having been executed the same day, was not produced in evidence, but is deemed to be the same in tenor as exhibit "D" referred to later on.

4. The bill further alleges that on the 13th June, 1881, while McKeague was in the same condition of mind above described, the said Neisser in the same way induced McKeague to sign two other agreements marked C and D, respectively, one of which (C) is identical with the agreement of the 9th April except that

the number of shares which McKeague is to have is reduced to 40,000 from 55,000.

The agreement "D" is as follows:

* * * * *

(These agreements were extended to August 13, 1882.)

5. The bill further alleges that while Mr. McKeague was still in the condition of mind above described, the said Neisser confederating with other persons to the plaintiff unknown, who well knew his unsound mental condition, persuaded him to execute and deliver a certain indenture by which he sold to the so-called corporation, The Heeia Sugar Plantation Company, all his interest in the said plantation for the nominal consideration of one dollar. (The deed is dated June 30th, 1882, and a copy annexed to the bill and marked exhibit A.)

6. That in order to induce McKeague to execute the above deed, Neisser and confederates represented to him that the so-called Heeia Sugar Co. was incorporated with a capital of one million dollars, represented by 100,000 shares at a par value of \$10 per share, and that the stock had been placed upon the San Francisco stock market and sufficient had been sold to place \$400,000 in gold coin in the treasury of the corporation, which sum Neisser promised to pay McKeague on his arrival in San Francisco in consideration for the sale of the Heeia Plantation. That McKeague, relying on these false and fraudulent representations, was induced and persuaded to execute and deliver to said Neisser, in Honolulu, on the 30th June, 1882, the deed of the plantation, which Neisser caused to be recorded in the Registry office in Honolulu.

8. That McKeague was induced to execute and deliver the deed to Neisser upon the verbal promise of Neisser to pay him in San Francisco as soon as he should arrive there the sum of \$400,000 in gold coin.

That McKeague, relying upon these representations and promises of Neisser, went to San Francisco to receive his money, and demanded of Neisser and the so-called Heeia Sugar Co. in July, 1882, the said sum of \$400,000, but the respondents failed to comply with this demand and still so refuse.

9. That by the terms of the deed of the plantation, the Heeia Sugar Plantation Co. did covenant and agree to pay off all the several mortgages resting upon the said Heeia Plantation, but all the said mortgages are still unpaid and uncanceled.

10. That McKeague was beguiled, persuaded and prevailed upon when of weak and unsound mind by the said Neisser and his confederates to sell the plantation, and that they obtained possession of the deed in bad faith.

11. That the Heeia Sugar Plantation was organized and incorporated for deceitful and fraudulent purposes, and to impose upon and defraud plaintiff, and that it is a foreign corporation and has failed to comply with the laws of this Kingdom to enable it to hold and convey real estate within this Kingdom.

12. That on the 15th November, 1882, Neisser and his confederates not having paid McKeague any consideration for the sale of the plantation, did oust and eject him from the plantation and still retain possession of the same.

13. That Neisser and confederates have, since they took possession, manufactured and sold from the plantation, 6189 bags of sugar of the value of \$48,350.24, and have sold 300 head of cattle of the value of \$8500, also 30 hogs of the value of \$400, and have converted the proceeds to their own use and have not accounted to the plaintiff.

14. That on the 1st February, 1883, Neisser fraudulently caused the lease of the lands of the plantation from Mr. and Mrs. C. R. Bishop to McKeague to be cancelled, and obtained a lease of the premises to the Heeia Sugar Plantation Co., dated 23d January, 1883, for a term of twenty-two years, to the wrong and injury of plaintiff. The bill prays for a discovery and account, for an injunction against disposing of any of the plantation property, and for a cancellation of the deed of the 30th June, 1882, as well as of the several agreements, and of the cancellation of the lease of Mr. and Mrs. Bishop to McKeague, etc.

The answer of M. Neisser and of the Heeia Sugar Co. denies that McKeague was impaired in mind or incapable of transact-

ing business, and sets up other matters of defence which will more fully appear when the evidence is being discussed. This case occupied four days in the taking of testimony and argument, and I cannot undertake to give in full all the evidence. I consider it proven by the testimony that the plaintiff, John McKeague, was, prior to a fall from his horse which took place February 12th, 1879, and which injured his head, a man of energetic, good business habits, and competent to manage the affairs of the plantation which he had acquired by long years of industry. Since the injury he was a changed man; his memory was poor; his mind was vacillating; he became neglectful in looking after the details so necessary to ensure the success of a large plantation. From a man of energy he became sluggish, dull and uninterested in what should concern him. It is impossible to say with absolute certainty that this condition is referable to the injury his brain received from the fall, but many witnesses have testified with such distinctness to the change as occurring about this time, that I cannot resist the inference that it was so occasioned. It does not seem to me that it was the despondency and loss of spirits which overcomes some men when reverses occur in their fortunes. For it does not appear that in February, 1879, the plantation had begun to run down, whereas it is in evidence that in 1880 and 1881, when Macfarlane had the agency, it had run down, and required extensive refits and improvements, and it may be that its condition was occasioned by McKeague's mental condition, which made him neglect the plantation. Dr. Brodie says that McKeague's present condition indicates mental disease, and his many acquaintances who have testified say that his condition in 1881 and 1882 was the same as now, except that one witness, McInerny, says he notices a little improvement at present. McGowan, a nephew of McKeague, and who has been on the Heeia Plantation for some eight years, says that when he first knew McKeague he was energetic and took good care of his plantation, but that after the fall from his horse he was altogether different, forgetful and neglectful, and that he used

skilled and expensive labor, as engineer, blacksmith and sugar-boiler, to irrigate cane after the crop was off, when there was work in the line of their respective trades for them to do in overhauling and repairing.

Wm. Henry says he has known McKeague for four years; that he was "stupid, had no life, was dead; the men did what they wanted to. He was easily led off by most anybody who came along."

James Dodd says he has known McKeague intimately for ten years. He was industrious and attended strictly to business. Saw him after the accident frequently. He seemed stupid, with no vim; no man in him. He had no memory of being surety on witness' bond. Before the accident his habit was to come to town only on Saturdays after 4 P. M. After the accident he was indifferent and did not seem to realize his responsibility; would stay three or four days in town at a time. Was with him in San Francisco in 1881, at the Grand Hotel. He would sit and sleep half of the time in the room at the hotel; said he came to buy a schooner and kept Captain Whitney as her intended master in San Francisco four weeks at his expense, and paid his passage both ways, saying to me sometimes that he was not going to buy a schooner, and sometimes that he was, and sometimes that he did not know what he would do. At the same time Mr. Dodd says that he had dealings with McKeague in the way of boarding horses for him, and he once swapped horses with him.

M. McInerny says he has known McKeague since 1862. "He was formerly a most excellent planter and a smart business man, second to none in the Kingdom. I consider him not a fit man to transact business since the accident." Two months before the accident witness loaned him \$500 for six months; when the note matured witness spoke to him about it. "He did not appear to know anything about it. He said what note? I don't owe you any \$500." Two or three weeks later he concluded to pay it. His memory was very defective. Had had a partial paralysis of the tongue, and it was difficult to under-

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stand him one or two years ago. Before his accident he could remember everything.

Mrs. Geo. H. Robertson, sister of Mrs. McKeague, was present when his horse stumbled and he fell off, striking his forehead on a stone. He was senseless. A doctor was sent for. McKeague was to have been married that day, and fearing he would die they were married that very night. He was laid up four weeks. He did not look and act as before. He was sleepy and lazy; would say "no, no," and he paid no attention to what we said.

Mrs. McKeague says her husband was a great deal changed since their marriage. He was stupid and would hardly say anything; hardly listened to me; memory not good.

Mr. T. A. Lloyd, the plaintiff's guardian, has known him for fifteen years, and has been his neighbor since 1876. Up to 1879 he was a capable plantation manager, and was looked up to as an authority. There was a marked change after the accident. Saw him the morning after, seemed all stupefied. Took three weeks to complete a cash transaction with him for the purchase of an old mill—would say that he would sell and then that he would not. He would wander. Would forget one week what he had said, and deny it the next week: could get no assessment from him in 1881. In 1882 he lost \$200, his books and labor contracts by robbery. Did not realize his loss. At McKeague's request took charge of his books and kept time of men. McKeague would often interrupt me in my work. Took people from the boiling-house and put them in the field. It was all the same to him if they got \$10 or \$100 per month.

C. E. Williams says, he has known McKeague for over twenty years. That there was a change in his condition after the accident. He had lost his vim; not so energetic as before. His memory was comparatively poor. Has had some small transactions with him since 1879, and there was nothing in these to warrant the opinion that he was a lunatic.

For the defense, Mr. Cecil Brown, the attorney who drew the agreements and the deed between McKeague and Neisser, says

that both McKeague and Neisser gave him the instructions on which to prepare the papers. Considered him capable of attending to business; would not hesitate to transact private business with McKeague if he had any. He was not as active since his fall. His memory seemed the same. I thought it was a foolish piece of business and tried to persuade him out of it, and got others to advise him the same way.

Mr. Henry Macfarlane says he was agent for McKeague's Heeia Plantation in 1881. Did not appear to have much force, was inclined to let matters go. No push in him to shove work as it ought to be attended to. He acted sometimes very silly. If he did not agree with you he would get angry and go off and do just as he thought fit. If he happened to get in a certain track you could lead him. I was not very successful in leading him. I would not like to say under oath that he was not capable of caring for his interests, but it is a matter of some doubt in my mind.

Dr. Kennedy came to me to buy him out for McKeague. I declined and told McKeague to let Kennedy alone. The plantation was run down and it was a poor time to buy Kennedy out. I used all the arguments I could. He said he would not buy, and then bought without my knowledge and gave Kennedy over \$40,000. Dr. Kennedy claimed a quarter interest. I thought it was a ridiculous price at the time.

The last time McKeague went to California he took his stallion "King William" with him and said he was going to sell him in San Jose for \$10,000. He brought the horse back.

Mr. H. Lose, an employee of H. Hackfeld & Co., says he had frequent business transactions with McKeague in 1879, 1880 and 1881, and saw nothing to make witness believe that he was incapable of managing his business and showed no weakness of mind or loss of memory.

A number of business letters were produced, dated since February, 1879, which witness testifies are in McKeague's handwriting; but both McInerny and Lloyd think they are not, but that the signatures are genuine.

Mr. Neisser declines to say what McKeague's present mental condition is; says he has had no opportunity of judging during the past year as he has not spoken to him.

The foregoing is an abstract of the most prominent testimony bearing upon the allegation that McKeague's mental condition was unsound and weak.

The result at which I have arrived is not that he is a maniac, but that his mind, since 1879, was no longer a safe guide to his actions, and he was thus in a state peculiarly susceptible to undue and improper influence.

I pass now to the evidence on the subject of these influences.

Mr. Henry says: I had heard about the transaction between Neisser and McKeague, and I told McKeague to have nothing to do with stock matters. He said "that's all right," and then threw it off. This was before the sale. About the time of the sale he talked to Neisser, and Neisser said McKeague was all right. There was \$400,000 in California for him as soon as he got there.

Mr. Dodd says that Neisser told him after he came back from San Francisco, that McKeague was to have \$100,000, and that McKeague introduced him in San Francisco, in 1881, to several men as the stockholders of the corporation, among them a Mr. Frank. I refer to this as showing that the stockholders as early as 1881 had opportunities for observing McKeague's mind.

Mrs. Robertson says that on the day the deed was signed, Mr. Neisser came to McKeague's house and she asked her sister, Mrs. McKeague, in Neisser's presence, where they were going. Mrs. McKeague replied, we are going to sign our names to the deed of sale of the plantation. I asked: "Mary, is this a good thing, tell me what you are going to do?" Mr. McKeague answered, "Neisser says it's all right." The witness then asked Mr. Neisser if it was all right, and he replied "Yes, it's all right, don't you be afraid. You'll have your money in San Francisco, \$400,000. It's ready for you." There is some discrepancy as to the hour of the day when it must have occurred, as Mr. Brown says the deed was signed about noon, and Mrs.

Robertson says it was after dinner, and they dined about 2 o'clock, P. M. Mr. Neisser says he cannot tell if he was at McKeague's house the day the deed was signed, but denies the statement testified to by Mrs. Robertson; but Mrs. McKeague substantiates her sister in this respect, and also says that Neisser told her at Heeia that the stock was sold at \$10 a share, and that we were to go to San Francisco and were to get \$400,000 in gold the very day we got there; and that they went to San Francisco to get the money. They did not get the money; Mr. Neisser said "Wait, wait, you'll get your money, don't be in a hurry." We waited there two months. Neisser came the day we left and said: "You go down to Honolulu and I'll come by the next steamer and bring the \$400,000." Neisser said "Don't you know you have 55,000 shares at \$10 a share, and that's \$550,000; \$150,000 will pay off all the mortgages and debts and you will have \$400,000 left."

Mr. T. A. Lloyd testifies that he understood from McKeague that he was to get \$400,000 for a half interest in the plantation from Neisser, and he (Lloyd) tried to get the idea out of McKeague's head. That Neisser knew of his efforts and traced McKeague's coolness towards him to Lloyd's influence, and in consultation told Lloyd that McKeague was not right in his mind; that he better not say anything about it, that it would be all right soon. "I have already broken down twice, and if I break down again the whole thing will be lost." Witness said: "It is a large thing this selling half the plantation for \$400,000, when the whole plantation is worth only \$200,000." Neisser said: "You don't understand it. McKeague will get his money and that's all you care about, isn't it?" Later, when Captain Ross was put in as manager in place of McKeague, Neisser told Lloyd that he must keep quiet and not say anything. This was in November, 1882, and Neisser said McKeague was not fit to manage a plantation.

Mr. C. E. Williams testifies that in San Francisco he saw Neisser on board a steamer about starting for Honolulu, and on Williams telling him that McKeague was intending to come to San Francisco by the boat leaving Honolulu that day, Neisser

took his valise and came ashore. He gave a message to Williams for McKeague that "his money was all ready for him." That it was all right.

Mr. Neisser denies these statements. I give his evidence in full.

* * * *

Several letters from Neisser to McKeague are filed. Two of them are dated in 1881, before the first agreement was made. I give a few of them in full.

Alameda, February 10, 1881.

JOHN McKEAGUE, Esq.

Dear Sir,—Hoping you are in possession of my last letter, I come up to my promise to keep you posted of my doings.

I stated to you that I succeeded up to last mail in getting nearly \$30,000 subscriptions, and to-day I am happy to state that the sum is reaching now nearly \$50,000, a proof that I am neither idle nor spending my money for nothing.

Altogether I am very well satisfied with my success so far, taking into consideration that this amount is nearly all composed of small subscriptions, and therefore you can form some idea of the amount of work done.

I am following up the same plan indicated by me in my last letter, and although it is an unpleasant business, still it leads to the end aimed at, and that is the main thing to get at.

I have not the least doubt that I shall carry it through now, but it may take me two or three months longer and will cost more money than expected in consequence, but never mind, the money will come back at the end.

I expect by this mail a letter from you with some remittance, which I need very much as my income, though ample for my family, is not sufficient at present to cover such additional expenses, and I could not carry it through unless assisted by you.

All the stock subscribed to up to now is at the rate of \$10 per share which means \$400,000 for you, a nice little sum to lay by.

With respect to your lady and hoping you are in good health,

I remain, yours truly,

(Signed)

M. NEISSER.

Honolulu, March 12th, 1881.

MR. JOHN MCKEAGUE,

Dear Sir,—Considering over the state of your plantation, I would make to you the following proposition which I think I could carry through with my parties in San Francisco.

Your plantation to be incorporated at San Francisco, with Board of Directors of influential and good standing men, and office there and office here, in 100,000 shares out of which you would receive for your benefit 55,000 shares, which is the controlling interest, and keep the management of the plantation with a salary according to agreement in your hands. No transfer of your leases, stock, etc., or anything else till the 20,000 shares are sold for cash at \$5, and the money in the hands of the treasurer, therefore no risk for you if I should fail with my proposition. 25,000 shares to be used for the purpose of getting a good and substantial Board of Directors whose names will influence the sale of the stock and give it a solid standing from the beginning.

STATEMENT OF STOCK.

Incorporation of shares.....	100,000
To John McKeague	55,000
" Board of Directors	25,000
" Working Capital	20,000
	100,000

TREASURY STATEMENT AT THE END OF 1881.

Cash sale of 20,000 shares at \$5.....	\$100,000
700 for sugar crop 1881 at \$140.....	98,000
	\$198,000
Payment of debt	\$35,000
Running expenses	40,000
	75,000
	\$123,000
Dividend of \$1.00 per share.....	100,000
	\$23,000
Balance in Treasury.....	\$23,000

STANDING OF JOHN MCKEAGUE AT THE END OF 1881.

Stock valuation—	
55,000 shares of stock at \$5.00.....	\$275,000
Probable increase of stock by declaring dividends of \$1.00.....	55,000
	\$330,000
Cash dividend of \$1.00 per share on 55,000 shares.....	55,000
	\$385,000

which would be a clear gain of \$170,000 to you as the plan-

tation has no more debts, but \$23,000 money at hand to pay the next year's expenses.

If 20,000 shares of this stock can be sold at \$5.00 each, your 55,000 shares have decidedly then the same value and could be sold too, if desirable, therefore my valuation.

If a dividend of \$1.00 per share is declared, which in this case would actually be the net earning of the plantation, the stock is bound to rise in value by itself, much more so if properly managed by men of standing whose interest is also equally at stake, and therefore is my valuation of your stock as near correct as it can be given at present.

By a consideration of my different statements you will have to admit that you would be the gainer to a great extent and no further trouble about money matters.

An answer at your earliest convenience would oblige me very much, as other parties are also anxious to accept my propositions, but I will only handle in the beginning a few plantations.

Yours respectfully,

(Signed)

M. NEISSER.

Please send your letter care of Mr. Bush.

Alameda, January 14th, 1882.

JOHN McKEAGUE, ESQ., Honolulu.

Dear Sir,—Having arrived here on the 28th of last month after a pleasant voyage, in good health, I found very soon the change in the climate rather unpleasant, and I am suffering up to date from a severe cold.

In regard to our corporation scheme I found very soon out that all the parties which had promised to invest money had a great deal to say, but that is all they ever done or ever will do in this matter, as they are afraid of King Spreckles. Grinbaum, with all his promises, has done nothing yet, although I believe he will come in by-and-by.

As soon as this state of affairs was sufficiently clear to my mind, I went my own way to entire different parties and suc-

ceeded so far beyond my expectations, and have not the least doubt of carrying it through.

I have now from different parties the amount of \$30,000 subscribed, all new parties, and Messrs. Fernbach and Landsberger cannot understand how I was able to succeed so quick. Nevertheless, I am fully aware that the hardest work is still before me, and that it will not only require all my energy but a great deal of time and money.

In order to see and meet the different parties, I resort to small invitations for private dinners, etc., which is all that is necessary to make them feel good, and in that way I force them to listen to me long enough to convince them of my benevolent intentions towards them in letting them have a few hundred shares.

Our business men here are so busy during the day that you never can talk with them and consequently cannot succeed with anything of that kind, therefore I adopt the means which promise success, which are expensive but apparently work the best. We have so far not fixed the price of the stock, \$5 will be the lowest, but we will probably raise it to \$7.50 or even \$10, but that will be decided as soon as I have the full amount subscribed.

I consider it my duty to inform you of my doings and hope you will be pleased so far, knowing very well that I am working in your interest here, and I can assure you that without my doing so here the whole affair would have ended in smoke.

I have no doubt that I will have to remain here two months, may be three months longer, and I must confess that I don't see how I can do it with the means at my hand, figuring up the amount already spent. When I left Honolulu I was prepared to use \$500 of my own money, and thought that with the \$500 from you I would have sufficient to carry it through. Now I am fully convinced that I will require twice the amount, and as I alone cannot afford it to spend from my own means, I must request you to pay your share towards the expenses, as without money nothing can be done. You have without doubt seen

enough during your visit here that San Francisco for such purposes is an expensive place, and that money alone judiciously spent will carry it through.

I expect next steamer, therefore, a draft on San Francisco in favor of Moritz Neisser, to assist me in carrying it through. If we make the stock \$10 your share will be \$400,000, twice as much as agreed upon, but that will not depend on me alone.

With my respect to Mrs. McKeague, I remain, with the expectation of your letter by next steamer without fail,

Yours truly,

(Signed)

MORITZ NEISSER.

Alameda, California.

Alameda, March 10, 1882.

JOHN McKEAGUE, ESQ., Honolulu.

Dear Sir,—Yours of the 11th February, with enclosure, came duly to hand, and I herewith express my thanks to you for the prompt attendance.

I am sorry to say that I was prevented from making any headway in our scheme on account of sickness; I had contracted a very severe cold one night coming home late, which compelled me to stay at home a good deal of the time, and preventing me from working in the usual way.

I think we shall take your advice, which is our opinion also, and incorporate now very soon, as the stock will sell then more easy, as in reality the company would not require the whole amount at once, as the mortgage of Isenberg is only due in September; and if the company has now sufficient money on hand to pay off all debts outside of this it would do just as well.

The present agitation in Congress against the treaty, with the most sure prospect of abrogation, is at any rate a large drawback for the sale of stock, while hereafter, if decided for or against the treaty, the people will look at the matter in a different light, and will come to the conclusion that plantations will probably not pay so big as heretofore, but still are a paying, legitimate investment at any rate.

MAY, 1884.

Please sign the inclosed paper and have it certified to before a Notary Public. I might require it to show to some of the directors my authority to incorporate.

With regards to your family, I remain yours truly,

(Signed) M. NEISSER.

Please direct your letter to M. Neisser, Alameda, California.

Mr. Fernbach has moved his office, and sends his best regards. Please answer by return of mail.

Alameda, April 10, 1882.

JOHN MCKEAGUE, ESQ., Honolulu.

Dear Friend,—Hoping you are in possession of my last letter by steamer, you will have seen how far I have succeeded in our enterprise, and for to-day I can state to you that we only are waiting for the paper sent to you in my last letter, to go ahead at once with the incorporation. Some of the parties acting as directors, men with money, will not do anything further unless I can produce to them your consent for the extension of time, and, as everybody else would most likely raise the same objection, we will have to wait until we receive from you the requested paper.

My health is very poor since I am here, and if it was not for this affair, which I intend to finish now, I would have been down at the Islands long ago; the weather all along has been very rough and cold, and any amount of rain. At any rate, as soon as the affair is fully settled up, I shall return to the Islands and see you.

Please give my respect to your lady. Hoping this will meet you in good health, I remain yours truly,

(Signed) M. NEISSER,

P. O. Alameda.

The conclusion I have arrived at is that M. Neisser, by his oft repeated promises, induced McKeague to believe that he would

sell the 40,000 shares which was to be his interest in the incorporated company, that is, two-fifths of the whole, for \$10 a share and thus realize \$400,000, and these alluring statements, made to McKeague while his mind was enfeebled and his judgment not good, entirely captivated him, and induced him to sign away his property against the remonstrances of his friends.

The case of *Harding vs. Handy*, 11 Wheaton, 103, is authority for the proposition that equity will set aside a conveyance obtained by undue influence from a person who was so infirm in body and mind from old age and other circumstances, as to be liable to imposition, although his weakness does not amount to insanity.

The moving cause creating the infirm condition of mind may be old age, or it may be disease or injuries or any agency, even an unknown one, but if equity finds from the facts and circumstances that advantage was taken of a weak intellect to press and secure an unconscionable bargain, it will annul it.

The transaction between McKeague and Neisser has resulted as follows: McKeague, considering only the uncontested facts, conveyed his plantation to a corporation in San Francisco for the consideration of 40,000 shares out of 100,000, that is two-fifths of the whole, and the agreement of the company to pay off the existing mortgages. In default of language in the agreement distinctly limiting the time when the mortgages should be paid, I hold that it is to be taken that the company agreed to pay the mortgages when they became due. In the case of the first mortgage of \$30,000 to H. Hackfeld & Co., and assigned to P. Isenberg, it is overdue as appears by the certificate from the Registrar's office, and it is not paid, and this shows a failure of consideration in the deed.

It seems to me that the requiring McKeague to surrender in San Francisco 20,000 shares of the stock to be kept as collateral security for the payment of the Kennedy mortgages, was an act of bad faith and a wrong.

It is testified by Mr. Brown that Neisser knew of the Kennedy claim April 9th, 1881, when the first agreement was made.

Neisser says he knew of it when the deed was signed, June 30, 1882, and the deed itself recites the Kennedy mortgage of \$54,500.

McKeague was not bound by any principle of law or justice to give up one-fifth of the stock of the corporation to secure the payment of a mortgage which the corporation had agreed to pay, and a man of ordinary sense and judgment would not have allowed himself to be thus managed.

Another circumstance showing the facility with which McKeague was induced to deliver the deed, and how completely he trusted Neisser, is as follows: The agreement of April 9th, 1881, and of June 13th, 1881, both stipulated that upon showing and proof to McKeague "that there is a sum of not less than \$100,000 in the treasury, that he will sign, execute and deliver a good and valid deed," etc., and yet McKeague, in spite of the caution of Mr. Brown not to deliver the deed until the stock had been handed to him, passes it over directly after its execution to Neisser, and there is no proof that McKeague ever inquired if this sum of \$100,000 or any part of it was in the treasury. Mr. Neisser on being asked if there was ever this sum in the treasury, replied that he was not the treasurer and did not know, and yet he says that McKeague's receipt for the 40,000 shares of stock shows that they were from him (Neisser), in order that he might have proof that he had carried out his agreement, and he ought to have known the facts.

It is remarkable that no one knows where McKeague's remaining 20,000 shares are. Mr. Neisser, however, says that the shares, though of the nominal par value of \$10, are not even quoted on the stock market, and there is no evidence that they ever have been.

This leads me to say that the agreement is broken in another respect, and that consequently the consideration in the deed has failed, for by the agreement Neisser agreed not merely to incorporate the Heeia Sugar Plantation under the laws of the State of California, but to place the stock of the corporation upon the market of San Francisco, through the agency of the San Francisco Stock Exchange Board.

If to "place" stock means to sell it, there is a plain failure of consideration.

But I am of the opinion that outside of the written agreements and the facts admitted by the defence, it is well proved that Neisser induced McKeague to part with his property by means of the promise that he would sell the stock for him at par and have the sum realized, \$400,000, ready for him in San Francisco—an idea which no sensible man would for a moment believe to be possible, considering that the plantation was worth say \$150,000 and had mortgages on it to the amount of about \$125,000. To realize \$400,000 for McKeague alone, to say nothing of the other three-fifths of the stock, out of a property worth only about \$25,000 clear, would imply that the public of San Francisco were to be swindled to accomplish this result.

Mr. Neisser made these assurances not only to McKeague but to his friends, undoubtedly to disarm them and to prevent them from dissuading McKeague from withdrawing from the bargain.

I look upon Neisser's getting McKeague over to San Francisco as suspicious. It was most useless and foolish for him to undergo the expense and loss of time of this voyage when the shares or the money for them could have been remitted to Honolulu. I cannot avoid the conclusion that the defendant wished to have McKeague where he could be operated upon away from the influence of his friends.

Upon a review of the whole case I am of the opinion that the bargain was against equity and good conscience and ought to be annulled, and I also find that the corporation defendant is not an innocent purchaser for value, and is not protected so far as the sale of the plantation is concerned. The cancellation of the lease to McKeague must also be annulled. But the corporation has expended sums of money in the improvement and development of the plantation, and it is clearly established by the evidence that the condition of the plantation now is much better than when the sale was made, and mortgagees whose money has been faithfully expended on the plantation should also be protected.

A reference should be made and an account taken, and a decree will be made after counsel have been heard.

There was a point made by counsel for the plaintiff that the corporation herein has failed to comply with the laws of this Kingdom so as to enable it to hold real estate and transact business in the Kingdom. An examination of the papers filed in the Interior Office discloses that they were so filed within the time prescribed by the statute. It is not necessary that they be filed by some person holding a power of attorney for that purpose.

The corporation did not, however, file a statement of its assets and liabilities on the 1st July, 1883. This being a condition subsequent, it has no effect upon the validity of the deed of June 30th, 1882. It can only affect the acts of the corporation subsequent to the failure to file, if at all.

J. M. Davidson, for plaintiff.

P. Neumann & E. Preston, for defendant.

Honolulu, May 14th, 1884.

KELIIKANAKAOLE *vs.* C. L. HOPKINS.

ASSUMPSIT. BEFORE JUDD, C.J.

JUNE, 1884.

A set-off held to be properly pleaded, and to be a demand of like kind with plaintiff's claim.

Defendant, in ejectment, will not be held liable for mesne profits taken, prior to his own entry, by those under whom he claims title.

DECISION OF JUDD, C.J.

This is an action to recover \$2191.25 and interest, from October 10, 1883, for money had and received by defendant to plaintiff's use.

It appears by the evidence that a certain premises, corner of King and Nuuanu streets, in Honolulu, had been in litigation,

and the defendant Hopkins had recovered one undivided half of the same as the nephew and heir-at-law of one Mainae, the patentee; the heirs of one Luau, the surviving husband of Mainae, being entitled to the other half. Luau had married again to one Kapihe, and she, after Luau's death, married Keliikanakaole, the plaintiff.

If there were no other heirs of Luau, Kapihe would be entitled to the whole estate of Luau, that is, one-half of the entire estate of Mainae. The defendant Hopkins claims that Kuewa was a niece of Luau, whose interest he had purchased.

In order to facilitate the closing of the estate, it was agreed that the premises should be sold and the proceeds divided. They were sold. Kapihe and Hopkins joined in the deed of conveyance, and Mr. W. R. Castle, counsel for Hopkins, retained the proceeds. It is a matter of uncertainty whether it was agreed that Hopkins should bring suit for what he believed was his share of the proceeds or whether Kapihe was to bring suit. It is much to be regretted that the paper containing the agreement, whatever it was, is now lost.

The sum of \$601.25 was paid on account to Kapihe, and she, by her husband, now brings action to recover the balance of one-half of the proceeds. Mr. Castle is garnisheed, and answers that "he received on 10th October, 1883, the proceeds of the sale, \$5585. Of this, Hopkins (and widow of Kaiawa) takes one-half (\$2972.50), and Hopkins has purchased of Kuewa, the only relative of Luau, her half-interest in the estate of Luau and claims \$1396.65 therefor, being half of \$2972.50; and also claims one-half of the rents and profits realized by Luau from the death of Mainae (November, 1877) to 1st April, 1882, which at \$20 per month for four years and three and a-half months is \$515; also three-fourths of rents since Luau's death, in all \$280, making more than the whole sum sued for."

To this it is replied by plaintiff, that the set-off is not provable on the ground (1) that the statute requires the set-off to be pleaded, which is not done by the defendant but by the garnishee; (2) that the set-off is not a "claim of like kind and

denomination, or existing in the same right" with the claim of the plaintiff for half the proceeds, as the latter is liquidated and the set-off is not.

I think these objections are all answered by the nature of the suit. The parties joined in the deed to the purchaser agreeing that their respective shares in the proceeds should be thereafter determined by litigation. I think that this agreement meant that whatever claims either party had to the money should be the subject of adjudication. If the plaintiff had been the custodian of the money, the defendant Hopkins could, as plaintiff, have advanced the very claims upon the fund which he now makes by way of defence. I do not think that the fact that Hopkins is now defendant should shut him off from proving any claim he may have to the money in the garnishee's hands.

In regard to the claim of Hopkins under the Kuewa deed, I consider the execution of the deed to be established.

The next question, whether Kuewa is the niece of Luau, is one of more difficulty. I consider it well proven that Luau had a brother Kahaule. But whether Kahaule was the father of Kuewa was strongly contested, and the evidence is very contradictory. The witnesses for Hopkins say that Kuewa was the issue of Kahaule and Haalou (w). The witnesses for plaintiff say that Kulepe was the reputed father of Kuewa by the same mother, Haalou, and that Kulepe was married to Haalou by the Mormon Minister George Q. Cannon.

On a review of the whole testimony I have come to the conclusion that Kuewa is shewn to be the daughter of Kahaule by Haalou, who were married, and she was therefore a niece of Luau and heir-at-law to one-half of his estate.

But Hopkins claims mesne profits on his one-half of the estate of Mainae recovered in the first action, and on his quarter of the estate since his purchase from Kuewa on July 25th, 1882.

These rents were collected by Luau from the date of the death of Mainae to his death, October 31st, 1882. The general rule is that the action for mesne profits is in form a personal action of trespass and cannot be maintained against the personal repre-

sentatives for the profits accruing during the lifetime of the ancestor.

See Taylor, Landlord and Tenant, §712, as put by Sedgwick and Wait on Trial of Title to Land, Sec. 663. "The defendant will not be held liable for mesne profits taken prior to his own entry by those under whom he claims title, but he can be charged only for the rents and profits accruing during the time he was actually in possession of the disputed land in the character of a disseizor. And a plaintiff in ejectment recovers mesne profits only from the time his right to the possession accrued."

Hopkins cannot, therefore, in this action recover his share of the rents received by Luau. His claim is only good against the plaintiff for rents collected by him since Luau's death.

The evidence on this point is that Kapihe (plaintiff's wife) collected the rent for November, 1882 (\$20), and that after this date the rents were consumed and more in prosecuting the lawsuit for the benefit of all the co-tenants.

Hopkins can therefore recover three-fourths of \$20, which is \$15.

TO RECAPITULATE—

Amount of proceeds of the land is.....	\$5585.00
Luau's estate is entitled to one-half of this amount, viz.....	\$2792.50
Of this amount plaintiff, for the widow of Luau, is entitled to one-half	\$1396.25
Hopkins recovers as mesne profits.....	15.00
Leaving	\$1381.25
Deduct what has been paid plaintiff.....	601.25
Leaving	\$780.00

for which judgment may be entered with interest from 10th October, 1883.

Costs divided.

A. S. Hartwell, W. R. Austin & W. A. Kinney, for plaintiff.

W. R. Castle, for defendant.

Honolulu, June 24th, 1884.

C. R. BISHOP *et al.*, Assignees of T. B. Walker *vs.*
T. H. DAVIES & CO.

IN EQUITY. BEFORE AUSTIN, J.

JUNE, 1884.

A mortgage given two months before the bankruptcy of the mortgagor held not to be in fraud of creditors: the mortgagees not having reasonable cause to believe that the mortgagor was insolvent.

DECISION OF AUSTIN, J.

This is an action brought to declare void, as against creditors, a mortgage given by said Thomas B. Walker, a bankrupt, to the defendants, for \$2293.50, dated October 1st, 1883, executed and delivered November 12th, 1883, payable four months after date with interest at 10 per cent, covering a leasehold interest and a block of three brick stores on King street, property of the bankrupt, upon the ground that when given the said bankrupt was insolvent, and that the defendants had reasonable cause to believe him insolvent. The defendants deny that they had reasonable cause to believe the insolvency. Section 978 of the Bankrupt Act, as amended in 1882, provides that "every assignment, conveyance or transfer of his property by him (the bankrupt) after he shall have become insolvent or committed an act of bankruptcy, except upon a good consideration to a *bona fide* purchaser having no reasonable cause to believe him insolvent or bankrupt, shall be void; and the property so transferred may be recovered and disposed of by the assignees for the benefit of the creditors."

At the time of the giving of the mortgage sought to be set aside, the evidence shows beyond dispute that Walker, the mortgagor, was insolvent, and the sole question in the case is whether the defendants then had reasonable cause to believe him to be insolvent.

Upon this point the substantial facts proved were as follows:

The mortgage was given to secure a precedent debt, contracted from time to time, from March to and including August, 1883, for building materials sold and resting in book account.

At the time of the sales the bankrupt was of the firm of Walker and Treadway, master builders, in Honolulu. They had several large contracts and appeared to be doing a prosperous business. After sales, on two occasions, Treadway paid defendants sums on account. About the 1st of October, the firm of Walker & Treadway was dissolved, Treadway owing the firm about \$1000. In October Treadway came to defendant's office and asked for his detailed account, saying he had dissolved with Walker and they wanted to pay up. The bill was soon made and delivered, and a few days after Treadway came in and it was fixed in amount by a deduction on lime, and Treadway said it would be soon paid. The account stood awhile, and then after November 1st, Wundenberg, the book-keeper and agent of the defendants, being directed by defendants, sought to settle the claim, and met Walker by appointment at the office of Luning, who kept his books, he being no scholar. Wundenberg pressed for payment. Walker wished to give note at six months, and said he would then pay at least half the amount, if not all, with interest. Walker said he had the leasehold interest referred to, two stores being rented at \$100 each, and the other held at same rent, but they were mortgaged for about \$11,000 to two different parties, C. R. Bishop and E. Furstenau. He also said he had a claim of \$1000 against Samuel Nowlein, and about \$1200 against the Government. That he was able to pay all his debts and intended to do so. Wundenberg pressed to be secured by the mortgage taken, saying the debt had stood five months, and he wished to have the claim on interest. Luning advised Walker not to give mortgage, saying that his notes had not been refused yet, and a note of hand ought to do.

Wundenberg proposed to collect and apply rents of stores. Walker said there was no necessity for that. No other debts owed by Walker were spoken of. Walker swore he then believed himself perfectly solvent.

Soon after the mortgage was given, on January 17th, 1884, Walker was declared a bankrupt on his own petition, which was dated January 7th, 1884.

At the time the mortgage was given, Walker owed, including all mortgages, the sum of \$18,489.86, and besides mortgages, \$5396.31.

Mr. Jaeger swore that the stores at auction ought to bring \$14,000 or \$15,000, and at the time of the mortgage there was due Walker \$300 from Samuel Nowlein, and several hundred dollars from the Government. No act of bankruptcy by Walker was shown to have been committed when he gave the mortgage, and Wundenberg swore he then believed Walker solvent and better off without Treadway. He heard nothing of bankruptcy till notice published. Defendants trusted all to Wundenberg, and knew nothing of the insolvency of Walker.

Upon these facts, had defendants reasonable cause to believe Walker insolvent when they took the mortgage? I think not. True, they pressed for the security; but this was a natural act, and finally the mortgage was freely given. Walker believed he could pay all, and the defendants thought he could, and there was no intention to give or take a fraudulent preference; with more time he might have paid all.

Up to time of mortgage no sign of Walker's being pressed for debt was shown. There were no public indications of his unsoundness. As matter-of-fact he was insolvent and in less than two months time petitioned as a bankrupt, but this alone is not enough to set aside the mortgage. He did not keep his own books and did not really know his own condition. I do not think there was sufficient shown to put defendants on inquiry as to his solvency. They acted in good faith, and should be allowed to retain their security.

Under the insolvency laws of most of the United States preferences can be given.

The Bankruptcy Statutes of England and of America, when in force, are somewhat different from ours, and the cases under them are not strictly reliable as authority, but analogous cases

are to be found in both countries. See *Jones vs. Howland*, 8 Met., 377; *Morgan vs. Brundetts*, 5 Barnewall and Adolphus, 297.

Fair measures to secure an honest debt against a debtor apparently solvent, though slow, ought to be commended and not condemned.

Let a decree be entered for the defendants with costs.

F. M. Hatch, for plaintiffs.

E. Preston, for defendants.

Honolulu, June 27th, 1884.

APAHU vs. SOPHIA FEARY.

IN EQUITY. BEFORE JUDD, C.J.

JULY, 1884.

A deed set aside, it appearing that the grantor, an aged Hawaiian woman, was of feeble mind, and that the grantee unduly influenced her.

DECISION OF JUDD, C.J.

This is a bill in equity by one Kapenapuka, as the next friend and guardian *ad litem* of an aged Hawaiian lady, Apahu by name, to declare null and void a certain deed of conveyance to the defendant, of a parcel of land situated at Kapalama, Honolulu, Oahu, dated March 7th, 1884. The bill sets forth that Kapenapuka is the son of Apahu; that she is between seventy and eighty years old; that she has been partially paralyzed for the past three years, and has been of feeble mind and incapable of transacting or understanding business; that she has been cared for and supported by her said son during this period; that on the 7th March last the defendant fraudulently induced the said Apahu to execute a deed of the said premises; that Apahu was induced to sign said deed only after repeated attempts to persuade her to do so, and she finally yielded to the undue influence of the defendant, not under-

standing the nature of the instrument. That said deed is expressed to be in consideration of one dollar, of love and affection on account of past services, and of an agreement for future services; and the petitioner alleges that said consideration is neither good nor valuable, and is insufficient to support the deed; that defendant has not in the past rendered any valuable service to Apahu, and has not bound herself to do so in the future.

It is submitted by the plaintiff's counsel, F. M. Hatch, that no valuable consideration is shown, and affection will not support the deed because the grantor is not related in any way to the grantee. That the conveyance must, therefore, be considered a settlement for the use of the grantor during her life, remainder to defendant.

I think the plaintiff's counsel is right in this contention. No adequate consideration is shown. The past services and support claimed to have been rendered are fully explained by the fact that defendant's adopted mother lived with Apahu, and defendant's acts were but the natural kindness of a neighbor towards an aged friend of her adopted mother. These are not sufficient to support a deed of bargain and sale under the circumstances. The grantor is a Hawaiian lady of over seventy years, suffering from a paralysis of her limbs of some years' standing; her bodily condition is one of great feebleness, and many witnesses say that they have observed times of incoherency of speech indicating a disordered intellect. The deed is a voluntary conveyance without power of revocation. The statements contained in the deed expressing the consideration are "the sum of \$1, the grantor's affection for the grantee on account of her having cared for the grantor during times past, and her agreeing to support her (the grantor) during the remainder of her life, and bury her, and other considerations." There is no relation of blood between grantor and grantee alleged or proved.

The grantor has a son living (Kapenapuka) who has adduced considerable testimony as to the care and support rendered by

him to his mother. The premises are worth from \$1,000 to \$1,500.

Reliable witnesses, Mr. Dowsett and Mr. Rosa, testify that the deed was read and explained to Apahu, and that the matter of procuring the deed occupied a good part of a week.

The attesting witnesses testify that they believe that she fully understood the transaction.

In Court Apahu said she never intended to dispose of the land in this way.

I note also that this old lady was then at defendant's house, cared for by her, and her son was absent and did not learn of the transaction until after it was completed.

Mr. Dowsett says he reminded her of her son, and she said: "Never mind that, I wish the land to go to defendant, as she will care for me."

It seems to me that this is a voluntary conveyance to the use of the grantor, remainder to defendant. For the consideration of future support by grantee, she not having bound herself by covenant, could not be enforced except from the land, and I think that it must mean that her support was chargeable to the land.

Let us see if, in the light of the authorities, such a conveyance can stand. I have no doubt that the highest Court of Great Britain would set this conveyance aside. See *Couts vs. Ackworth*, L. R. 8 Eq., 558; *Everett vs. Everett*, L. R. 10 Eq., 405; *Hanley vs. Pearson*, L. R. 13 Eq., 545; *Hall vs. Hall*, L. R. 14 Eq., 365; *Thompson vs. Dutton*, 23 Ch. Div., 281.

But the Courts of this country have not been so liberal in setting aside voluntary conveyances. In *Afong vs. Afong*, 5 Haw., 191, I adopted the law of *Viney vs. Roberts*, 109 Mass., 300, where it is laid down that "a voluntary settlement completely executed, without any circumstances tending to show mental incapacity, mistake, fraud or undue influence, is binding, and will be enforced against the settler and his representatives, and cannot be revoked, except so far as a power of revocation has been reserved in the deed of settlement."

In the case before me I find old age, bodily weakness, mental weakness amounting to incapacity at times, and in addition an improvident conveyance by which the grantor is immediately deprived of her title to all her estate for an inadequate consideration and undertaking for future support, insufficiently executed.

In *Perry on Trusts*, Section 190, the author says: "It is quite immaterial from whence the mental weakness arises. It may arise from a natural and permanent imbecility of mind, or it may arise from some temporary illness or debility, or from the weakness and infirmity of extreme old age. Each case must depend upon its own circumstances. Questions generally arise when there is not an entire want of capacity, where no general rule can be laid down, but the Court is left to judge of the capacity of the contracting party, of the circumstances under which the contract was made, and whether from all the facts in the case the contract ought in equity and good conscience to be sustained."

In *Moore vs. Moore*, 56 Cal., 89, the Court held (in 1880) "that whenever there is great weakness of mind in a person executing a conveyance of land, arising from age, sickness or any other cause, though not amounting to absolute disqualification, and the consideration given for it is grossly inadequate, imposition or undue influence will be inferred, and a Court of equity will, upon proper and reasonable application of the injured party, interfere and set the conveyance aside."

Says Judge Field, in *Allore vs. Jewell*, 44 U. S., 511, "It is not necessary, in order to secure the aid of equity, to prove that the deceased was at the time insane, or in such a state of mental imbecility as to render her entirely incapable of executing a valid deed. It is sufficient to show that from her sickness and infirmities she was at the time in a condition of great mental weakness, and that there was gross inadequacy of consideration for the conveyance. From these circumstances, imposition or undue influence will be inferred."

Having found circumstances from which undue influence can

be inferred, I am of the opinion that the deed ought to be cancelled. Decree accordingly.

F. M. Hatch, for plaintiff.

E. Preston, for defendant.

Honolulu, July 3, 1884.



MAKANOANO MERSBURGH *vs.* JAMES RENTON *et al.*

IN EQUITY. BEFORE JUDD, C.J.

JULY, 1884.

Plaintiff held entitled to recover full interest on a mortgage, the defense of tender not being made out.

DECISION OF JUDD, C.J.

This is a bill in equity to foreclose a mortgage made by the defendant Renton on certain lands in Kohala, Hawaii, the estate having been transferred to the Union Mill Company.

The mortgage is for \$2,000, with interest at 8 per cent. per annum, and is dated September 11th, 1877. It became due September 11th, 1881. The answer admits the execution of the mortgage and the transfer of the estate, but alleges that when the mortgage was due payment was not demanded, though the defendant company was willing and prepared to pay the amount due, principal and interest; and on inquiry why it was not demanded, defendant learned that the mortgage and note were lost, whereupon defendant agreed to pay principal and interest upon a sufficient bond of indemnity being executed. The offer to furnish indemnity was made by plaintiff in March, 1884. The proofs show that the interest was paid regularly up to the 11th March, 1881, and that there was due of interest, up to the 11th September, 1881, eighty dollars. The sum of \$2,000 principal and \$80 interest is paid into Court. The contest in this

case is upon the question whether the defendant is now liable for full interest to date. The defendant contends that interest ceases to run from the time of its offer to pay on the execution of indemnity.

The plaintiff contends that no legal tender was made, and that full interest should be allowed her.

The plaintiff says, in evidence, that she never demanded payment of the mortgage, nor authorized any demand on her behalf; also, that no tender was made to her. It is in evidence, however, that Mr. Brown, the attorney for defendant, wrote, soon after the mortgage became due, to Mr. Vida, who was acting as plaintiff's agent, and ascertained that the mortgage and note were lost, and then offered to pay the amount due on Mr. Vida's engaging to provide suitable indemnity. This Mr. Vida declined to do, and matters went along until March of this year, when Mr. Brown offered to pay one-half of the computed interest, which offer being refused, this bill is brought.

In Jones on Mortgages, Sec. 899, it is laid down that "it is a settled rule that interest will cease to run from the time of tender, when the money really due upon the mortgage is actually and properly tendered by a person having the right to make the tender, so that the mortgagee is bound to accept it."

But tested by the well settled rules of law applicable, no sufficient tender has been shown to have been made. For a tender must be absolute and unconditional. No actual money was offered.

Indemnity is required in case of a lost note in order that the payee may not be twice liable on the same instrument, but there are abundant authorities to this effect that if the note is not negotiable no indemnity can be required.

No question is, however, made in this case as to the right of the plaintiff to foreclose the mortgage upon secondary evidence, *i. e.*, the certified copy of the mortgage from the Registrar's office, the original being lost.

I am of the opinion that the plaintiff ought to recover full interest. It was the duty of the debtor to see his creditor, to

make his payment and to make legal proffer of the money, if he expected to stop interest.

Decree accordingly.

J. M. Monsarrat, for plaintiff.

C. Brown, for defendants.

Honolulu, July 22d, 1884.

E. A. McBRYDE *vs.* J. KALA, Tax Collector.

ASSUMPSIT. BEFORE JUDD, C.J.

SEPTEMBER, 1884.

Questions of over-valuation or wrong ownership should be settled by the Court of Tax Appeals: but the Supreme Court has jurisdiction of cases involving construction of the statutes, or where principles of law are violated: which would include double taxation.

Under the Tax Law of 1882, taxation of a "debt" is illegal.

DECISION OF JUDD, C.J.

This is an action to recover \$116.25 paid in 1883 under protest, by the plaintiff to the defendant, as tax-collector of Koloa, Island of Kauai; and the plaintiff seeks to recover this sum as being the taxes on the amount of \$15,513 owing the plaintiff by Theo. H. Davies & Co., of Honolulu. It appears that Theo. H. Davies & Co. made due return of their property to the tax assessor of Honolulu, without deducting the debt of \$15,513, due from them to the plaintiff.

The Minister of Finance comes in for the defendant and demurs.

The first point to be considered is whether the Court has jurisdiction. It is urged by defendant's counsel that plaintiff should have appealed from the assessment of this tax to the Court of Tax Appeals.

The decisions of this Court of limited jurisdiction are by Sec. 50 of Chapter 43 of the Acts of 1882, declared to be final and conclusive, but they can only be so upon matters of which

the Court has jurisdiction by appeal of the aggrieved taxpayer.

Section 40 of the Act is as follows: "Any person whose name may appear on such tax list, and who shall have made his returns to the assessor as hereinbefore provided, and if entitled to exemption, shall have claimed such exemption, and who may deem himself aggrieved by any excess made by the assessor in the valuation of the property as returned, or in the amount or character thereof, or whereby the amount payable by such person is increased beyond the amount which would be payable by him according to such return, or whose claim for exemption shall not have been allowed, may appeal from such assessment on lodging with the tax assessor on or before the 1st day of October, a notice in writing, stating his grounds of objection to his assessment or to such portion thereof as the objection applies to, and depositing therewith a sum for cost of appeal as follows."

There can be an appeal taken where (a) there has been an excessive valuation by the assessor of the property returned; (b) or where the amount of the property is increased from the return (here cases where property is assessed to a person who is not the owner are provided for); (c) or where the character of the property is changed so that it is subject to greater taxation; (d) or where the amount of taxes to be paid is increased by the assessor beyond that payable by the appellant according to the return, without changing the character of the property (here errors in calculation can be corrected); (e) where statutory claims for exemption are not allowed by the assessor.

If the above analysis of the statute be correct, the cases where constructions of the act are involved or principles of law are violated, which would include cases of duplicate taxation, are not covered by the statute.

Of these, the Supreme Court, by the law which gives it jurisdiction over all cases in law and in equity, has jurisdiction. Sections 819 and 829 of the Civil Code, and Article 67 of the Constitution.

Pure questions of over-valuation, or of including property of

which the person sought to be held liable is not the owner, can be remedied by an appeal to the "Court of Tax Appeal," where these matters can be corrected, and there seems to be no reason to doubt that they cannot be corrected by resort to an action at law. See *Howe vs. Boston*, 7 Cush., 273; *Lincoln vs. Worcester*, 8 Cush., 55; Cooley on Taxation, p. 528; *Castle vs. Luce*, 4 Hawn., 63.

The question in the case before me is whether a "debt" is subject to taxation. This is a question of law. By the Civil Code of 1859, Sec. 483, the term "personal property" shall be construed to include all household furniture, goods and chattels, wares and merchandise, all ships and vessels whether at home or abroad, all moneys in hand and moneys loaned, all mortgages, public stocks, stocks in corporations, and every species of property not included in real estate.

Section 16 of the Act of 1882, now in force, prescribes that the term "personal property" for the purposes of this act shall be deemed to mean and include all household furniture and effects, goods, chattels, wares and merchandise, all ships and vessels whether at home or abroad, all moneys in hand, leasehold and chattel interests in lands and real estate, growing crops, public stocks and bonds, and all domesticated animals not herein specifically taxed.

It was the manifest intention of the Legislature of 1882 to no longer tax as property "debts" or evidence of indebtedness, whether secured or unsecured, and to impose taxes only upon tangible property. The words of the former law, "moneys, notes of hand, unsecured debts," are omitted in the present, and "all moneys in hand" substituted therefor.

Only actual cash in hand is taxable. The imposition of a tax upon promissory notes, book debts, accounts owing, in fact every species of mere representatives of value, is by the present law illegal. The only exception to this is that of "public stocks and bonds," and the provision that the mortgagor of property which is mortgaged is liable to taxation (as between him and the mortgagee), on the difference between the whole value of the

property mortgaged and the amount of the money due on the mortgage, and this was so enacted in order to avoid the imputation of double taxation.

The tax collected of the plaintiff, being upon a debt owing her by a third party, was illegally collected, and having been paid under protest should be returned.

The demurrer is overruled.

The defendant's counsel intimating that he has no further answer to make, judgment may be entered for the plaintiff for \$116.25 without interest or costs.

W. R. Austin, for plaintiff.

W. A. Whiting (Deputy Attorney-General), for defendant.

Honolulu, September 30th, 1884.

HAIKU SUGAR COMPANY *vs.* A. FORNANDER, Tax
Collector.

ASSUMPSIT. BEFORE JUDD, C.J.

SEPTEMBER, 1884.

The taxing of water as the property of a Ditch Company, and again as giving increased value to land irrigated by it, held to be double taxation, and illegal.

The question involved is not merely one of valuation.

DECISION OF JUDD, C.J.

The plaintiff corporation seeks in this action to recover \$336.19 from the Tax Collector of Makawao, Maui, being an amount alleged to have been illegally collected from the plaintiff as taxes, paid under protest.

The essential facts, as admitted, are that the plaintiff corporation made a due return of its taxable property in the month of July, 1883, to the Assessor. Among other items the plaintiff returned 3885 acres of cane land at \$20 per acre, upon which 723 acres of cane were growing. The Assessor declined to take

this valuation, but assessed 3162 acres at \$30 per acre, and 723 acres at \$92 per acre. This valuation of \$92 per acre was placed upon the 723 acres as "watered" or irrigated land, whereas the valuation of \$30 per acre was placed upon cane lands in Makawao having no water. The cane growing on all these lands was assessed separately.

The water used by plaintiff in irrigating the 723 acres was obtained from the Hamakua Ditch Company, a water supply company furnishing water in Makawao for a consideration; and the Hamakua Ditch Company was assessed and has paid taxes upon the full cash value of its property in the district of Makawao.

The tax of \$62 per acre on the 723 acres (*i.e.*, the excess of \$92 over the \$30 for which unirrigated land was valued), was paid under protest; and the plaintiff claims that it is an illegal tax, as being a duplicate taxation on the same property.

It is claimed that the valuation of \$62 per acre is for the enhanced value of the land by reason of its having water upon it to irrigate the cane planted thereon; and the water having already been assessed and the taxes paid, as the property of the company supplying this water, this property is twice taxed.

It was held by Chief Justice Harris and Mr. Justice McCully of this Court, in a case reported in 4 Haw., 275, that the Hamakua Ditch Company was rightly taxed for the water brought on and supplied by it to various land owners in Makawao, as a distinct property. I am not at liberty in this case to question the soundness of that opinion (though I confess to some doubts as to whether water actually used in the irrigation of crops can properly be considered as a distinct property from the land which it benefits, and into which it sinks), for the fact exists that this water has been taxed as property to its owner, and this assessment was made in pursuance of the authority of the decision of the Court above referred to. The 723 acres of land in controversy, if water was not used to irrigate the cane upon it, would not have been assessed at the rate of \$92 per acre; but it would have been valued by the

Assessor, we must presume, at \$30, the rate fixed by him as the value of non-irrigated land in the district.

I think it follows logically that the water used for irrigating plaintiff's 723 acres has been twice taxed, once as the property of the Hamakua Ditch Company, and again as giving an increased value to the land of \$62 per acre.

Duplicate taxation is illegal. See *Castle vs. Luce*, 4 Haw., 77.

I am not convinced by the argument of defendant's counsel that the question involved here is one of valuation simply, and therefore the subject of appeal. It is true that the tax objected to is the excessive valuation of cane land, but the amount of this over-valuation can only be questioned in this case on the ground that the water which gave the land its increased value has been, as above stated, twice taxed—once *in solido* as the property of the Hamakua Ditch Company, and again as the distributive share owned by the plaintiff and used on its land.

Let judgment be entered for plaintiff for \$336.19.

W. R. Castle, for plaintiff.

W. A. Whiting (Deputy Attorney-General), for defendant.
Honolulu, September 30, 1884.

AIKOE vs. F. H. HAYSELDEN, Tax Assessor.

MANDAMUS. BEFORE JUDD, C.J.

OCTOBER, 1884.

The signing of an assessment blank by the person making and filing it, held to be waived by the failure of the assessor to require it at the time of filing: and the assessor having refused to grant a certificate of appeal because said blank was not signed, the duty of the tax-payer to file a written notice of appeal was also waived. Mandamus issued to compel the assessor to grant a certificate of appeal.

DECISION OF JUDD, C.J.

This is a petition for a mandamus to compel the issuing of a Certificate of Appeal to the Court of Tax Appeal of Honolulu.

On the part of the petitioner it is shown that she, by her attorney, G. W. Pilipo, placed, on the 31st July, 1884, in respondent's hands a list of her property with valuation, on a blank furnished by respondent. The blank was not signed, but Mr. Pilipo says he was ready to sign it when sworn to its correctness by the assessor, and which he expected him to do; but the assessor took and accepted the return without requiring him to sign or swear to it. That on the 12th of September (one of the days on which the assessor is required by law to attend with his tax list in order that persons liable to taxation may inspect the same), Mr. Pilipo went to respondent's office, and on examination of the list found that the valuation of the property of Aikoe had been much increased; that he stated to respondent that he desired to appeal against the assessment, and thereupon demanded a certificate of appeal. The respondent replied that he would not grant him an appeal because the return was not signed and was not a legal return. The refusal to grant an appeal being persisted in, the petitioner applies for a mandamus to compel the granting of a certificate of appeal.

The answer and return of the respondent is to the effect that the petition is insufficient because it is nowhere alleged that the plaintiff has lodged with the tax assessor a notice in writing stating the grounds of objection to her assessment, or that she deposited therewith a sum for costs of appeal as by law required. Also, that the assessor duly advertised the days according to law, during the month of July, when he would meet the residents of Honolulu to receive statements of their property, and that during such time neither the plaintiff nor anyone on her behalf presented to the assessor any statement of her property, and that thereupon he assessed the property of the plaintiff in accordance with the law.

The assessor states in evidence that he has no recollection of Mr. Pilipo's presenting him with Aikoe's return—that the first recollection he has of this matter is an interview on the 12th September, when he refused the appeal to Mr. Pilipo because the return was not signed. Mr. F. L. Clarke, who acted as the

assessor's assistant, says that he has no recollection of who gave him Aikoe's return, but that it bears the endorsement in his handwriting "Aikoe, Honolulu, Rec'd August 1st, 1884," and that he was instructed to endorse dates and receipts of blanks deposited after 31st July.

Mr. Pilipo is quite positive that he handed the return to Mr. Hayselden on the 31st July, and details the circumstances. He also says that when he presented the return he asked Mr. Hayselden if there was anything more to do, and Hayselden replied "No." It is quite possible that Mr. Hayselden did not hand the return to his assistant (Clarke) until August 1st. In default of distinct recollection to the contrary by Hayselden and Clarke, I feel compelled to take Mr. Pilipo's statement as the true explanation.

The facts being thus settled, the question arises whether the assessor was justified in refusing the appeal on the ground that the return was not signed.

The law requires the return to be signed. It is equally imperative in requiring it to be sworn to. The petitioner's counsel says he was ready to comply with these requisites, but that the assessor did not require them of him. It is the plain duty of the assessor to see to it that the formalities of the law are complied with, and he must call the attention of the person presenting the return to the defect. If he, however, accepts it without question, it must be taken as being conformable to the law and he cannot thereafter take advantage of the defect and deny an appeal on account of this defect.

But it may be said that the signing of the return is a requirement of the law binding upon the taxpayer separate and distinct from the requirement of swearing to it. So far as this case is concerned it must be held otherwise, for the blank prepared by the Government contains at the end a jurat in the form prescribed by the statute and below it a blank line for the signature, and below this the following: "Signed and sworn to before me this.....day of.....188....

.....Tax Assessor."

This is quite sufficient to make the person presenting the return believe that the signing must be in presence of the tax assessor and as part of the act of swearing to it, and also that the date is to be filled out by the assessor.

The further point made in the answer to the petition, that the petitioner did not lodge with the assessor a notice in writing stating his grounds of objection to the assessment nor deposit costs of appeal, I consider insufficient under the facts of this case.

It is a well-settled principle of law that "where the tender or performance of an act is necessary to the establishment of any right against another party, this tender or offer is waived or becomes unnecessary when it is reasonably certain that the same will be refused."

This principle was adopted by the Supreme Court in *Johnson vs. Tisdale*, 4 Haw., 605.

The assessor had said that he would not grant a certificate of appeal to the applicant because the return was not signed. The applicant was not obliged to state his objection to the assessment in writing or to tender costs, for he had more than reasonable cause to believe that his appeal would be refused. It would be a work of supererogation, after such a positive statement by the assessor, to write out the objection to the assessment and to tender costs.

I am of the opinion that the petitioner is entitled to a certificate of appeal.

Let a mandamus issue.

G. W. Pilipo, for plaintiff.

The Deputy Attorney-General, for respondent.

Honolulu, October 6th, 1884.

F. T. LENEHAN *et al.*, Assignees, *vs.* W. S. AKANA *et al.*

IN EQUITY. BEFORE JUDD, C.J.

DECEMBER, 1884.

A chattel mortgage of a trader's stock held to be in fraud of creditors and set aside: the mortgagee having reasonable cause to believe that the mortgagor was insolvent.

The acknowledgment of a chattel mortgage being defective, for failure of the notary public to attach his seal and comply with the statutory forms: held, it was not entitled to be recorded, and the recording of it must be treated as a nullity.

DECISION OF JUDD, C.J.

The plaintiffs are assignees of Lee Chat, a bankrupt.

On the 27th of March, 1883, Chang Yau, a small trader in Hilo, after having heard that Lee Chat, to whom he owed a considerable sum of money, had absconded the Kingdom, made a chattel mortgage of all his stock of dry goods, provisions, etc., "and all other goods, wares and merchandise now in my store on Front street, town of Hilo," to W. S. Akana and Acho, to secure four promissory notes in favor of Akana amounting to \$800, and one in favor of Acho of \$500. The notes and mortgages were made payable on demand, and payment of them all was demanded the next day, March 28th. Possession of the goods in the store was taken by Akana a few days later, and they were sold at auction about a month later, the sale realizing about \$1400. Judgment was also confessed on these notes by defendant Chang Yau, in the Police Court of Honolulu.

The bill prays *inter alia* that the mortgage may be adjudged fraudulent and void as against the plaintiffs. It is in evidence that Chang Yau, some six or seven months previous, desiring to open a store in Hilo, borrowed \$50 of Akana (whose wife was his cousin) to pay for his retail license, and a month later Akana advanced him \$300 as capital. About this time Ah Yau came to Honolulu and bought goods of Lee Chat and had them

marked in Akana's name. There is some testimony to the effect that Akana guaranteed or became surety for this account, but I am not at liberty to consider it, for in an action tried in this Court to hold Akana thus liable, it was decided adversely to this position, and it is *res adjudicata*. Lee Chat continued to send goods as ordered to Chang Yau, and received occasional remittances. After Lee Chat absconded, his assignees in bankruptcy recovered a judgment against Chang Yau for \$2600, and it is still unsatisfied. Meanwhile Akana's wife loaned Chang Yau \$300, and Akana paid a bill of \$150 for lumber used in fitting up the store.

The amount of \$500 for which Chang Yau gave his note to Acho one day before the mortgage was made, need not be considered, as Acho was not served with process, being absent in China.

I think it is clear from the evidence in the case that Akana had reasonable cause to believe that Chang Yau was insolvent when he took the mortgage upon his stock-in-trade. Loo Ngawk testifies that Akana admitted to him that he knew that Chang Yau owed Lee Chat over \$2000. Having married his cousin and allowing him to have his goods sent in his name, and advancing him money for his license and for fitting up his store, it cannot be supposed that in a small town where the business was under his daily observation, he could have been ignorant of the condition of Chang Yau's business. His haste in getting a mortgage executed, made by its terms payable on demand, after he heard that Lee Chat had absconded, leaving large indebtedness, and knowing that prompt measures would be taken by Lee Chat's creditors to collect all available assets, his haste in taking possession, closing the store and selling the goods, are to my mind all *indicia* of fraud. He certainly knew that the money he advanced to pay for license and for fitting up the store was not invested in the goods he seized, and which realized at an auction sale more than his whole debt, and that Chang Yau was without capital except as he supplied it, and that the stock of goods was procured on credit, and that the

short time (a few months) in which he was in business had not sufficed to enable Chang Yau to pay his Honolulu creditor from his profits. I cannot consider him as a *bona fide* purchaser protected by the statute.

I pass now to another point made by the complainants. The certificate of acknowledgment to the mortgage is as follows:

"Hilo, Hawaii, }
"Hawaiian Isles. } s. s.

"On this 27th day of March, A. D., 1883, personally appeared before me ———, known to me, who acknowledged that he executed the foregoing instrument freely and voluntarily, and for the uses and purposes therein set forth.

"Given under my hand and seal,

"D. H. HITCHCOCK,
"Notary Public."

The seal of the notary is not affixed to the instrument. This certificate does not comply with the form prescribed by the Act of 1872 in that it omits the substantial part: that the person acknowledging the instrument was known to the officer to be the person described in and who executed the instrument. But this form applies only to instruments affecting real estate: see Compiled Laws, p. 407: and this is a mortgage of chattels. But Section 1255 of the Civil Code prescribes that "to entitle any conveyance or other instrument to be recorded, it shall be acknowledged by the party or parties executing the same," before the Registrar of Conveyances, or his agent, or some Judge of a Court of Record, or notary public, etc., etc. The certificate does not set forth who came before the notary. It is not an acknowledgment of the party executing the instrument and does not comply with the law, and therefore the instrument was not entitled to be recorded. A chattel mortgage must be recorded in order to its validity. Section 1263 Civil Code. *Ellis vs. White*, 3 Haw., 205.

There is a wide distinction between the effect of the record of mortgages of chattel property and one of real estate. The record of the former is essential to its validity; the record of the

latter operates as notice to subsequent purchasers or mortgagees, and has no effect upon the validity of the instrument, for if actual notice of a prior mortgage can be proved, it is as effectual as recording would be, and in such cases the spreading upon the record of a mortgage of real estate, though by reason of its informality not entitled to record, has been held to be notice to creditors and purchasers.

I think that as the mortgage in question was not properly acknowledged it was not entitled to be recorded, and though spread upon the record it must be treated as a nullity so far as the plaintiffs are concerned.

But Chang Yau's estate must be treated as if he were a bankrupt. The defendant Akana has a valid claim against Chang Yau for \$800. He is entitled to a dividend on this amount from the funds realized from the sale of Chang Yau's assets, less amount of Acho's claim. As to the rest Akana is adjudged to hold it in trust for the plaintiffs. That is to say, the fund realized from the sale was, say\$1400.00
Deduct Acho's note, say 500.00

\$ 900.00

Akana's claim is, say \$800.

Plaintiff's claim is, say \$2600.

The amount of \$900 is to be distributed to these creditors *pro rata*.

Decree accordingly.

C. W. Ashford, for plaintiff.

W. R. Castle, for respondents.

Honolulu, December 11th, 1884.

In re KAMEEUI.

PROHIBITION. BEFORE JUDD, C.J.

DECEMBER, 1884.

District and Police Justices have no jurisdiction to try trespass *quare clausum fregit*, where the plea is *liberum tenementum*.

DECISION OF JUDD, C.J.

By the petition in this case and the annexed exhibit, it appears that on the 8th of November, 1884, an action of trespass was begun in the District Court of North Kona, Island of Hawaii, by Ben Tenorio and Moeawakea, against the petitioners, alleging that they had wrongfully entered a fenced close at Kahaluu, in North Kona, and built a house thereon, contrary to the rights of the plaintiffs, to their damage \$40; also that the case was heard by J. G. Hoapili, the District Justice, on the 10th of November, and the petitioners answered that they had entered the land but that they had a right so to do under the authority of one Helani (w.), who claimed the land; and that J. G. Hoapili, District Justice, rendered judgment that the petitioners should remove the house from the land or pay damages \$40, and costs of Court \$20.10, and that execution has been or is about to be issued therefor. The petition prays for a writ of prohibition, to be directed to the Judge and the parties suing in the inferior Court, forbidding them to proceed further in the cause on the ground that the cause is beyond its jurisdiction.

The plaintiffs in the trespass suit, respondents herein, demur and say that the petition does not set forth such a case as entitles them to the relief prayed for. The issue of law thus raised is whether a District Court has jurisdiction to try an action for trespass *quare clausum fregit* when the defendants plea is *liberum tenementum* or title in themselves.

The petitioners counsel, J. M. Poepoe and W. L. Holokahiki, rely upon *Coney vs. Manele*, 4 Hawn., 154, in support of the

proposition that District Courts cannot try titles to land; also, that petitioners are not bare tort-feasors, but that there is a privity of contract between them and Helani, who has the legal title: referring to 6 Wait's Actions and Defenses, p. 90, and cases cited.

The respondents' counsel, Kinney & Peterson, urge that an action of trespass determines nothing in respect to the title of the land in question beyond the action tried, and rely upon *Chandler vs. Walker*, 21 N. H., 282, and cases cited; *Waterman on Trespass*, §1119, *et seq.*; also Wait's Actions and Defenses *supra*.

BY THE COURT.

The case of *Coney vs. Manele* was an action for summary possession of land where the defense was made of title in the defendant, and it was there held that the District Magistrates have no right to try titles to land. This is not disputed by respondents, but they claim that the title to the land is not involved in this case.

In *Waterman on Trespass*, Sec. 1119, the author says that "a judgment for the defendant in an action of *quare clausum fregit* would not be conclusive upon the title because the right of possession only, and not the title, is involved in the action of trespass." * * * "Yet the title may be litigated as a matter directly involved in the issue; and when that question is adjudicated and a judgment rendered in this form of action by a Court of competent jurisdiction, the judgment will conclude the parties and operate as an estoppel if the matter appears on the face of the record, or as evidence conclusive in relation to the title in any subsequent litigation of the matter between them." 4 Cowen, 589, 11 N. Y., 420.

In 2 Greenleaf's Evidence, Section 613, the author, in speaking of trespass, says: "Though the right of property may and often does come into controversy in this action, yet the gist of the action is injury to the plaintiffs' possession." And in Sec. 626, "The plea of *liberum tenementum* admits the fact that the plaintiff was in possession of the close described in the declara-

tion, and that the defendant did the acts complained of, raising only the question whether the close described was the defendant's freehold or not."

An inspection of the petition shows that the defendants admitted the acts complained of, but set up title of a third party to the land, under whom they acted. To properly decide this suit the title must be passed upon, and in the law Courts of Record of this Kingdom there would be no difficulty in the way of this procedure.

But it would not be right to allow the title to real estate to be thus settled by a District Justice, for a judgment of this character in an action of trespass would work an effectual estoppel in a subsequent action of ejectment—certainly so far as the particular part of the land trespassed upon was concerned.

Assuming it to be law that actions to try titles to land are beyond the jurisdiction of District Courts—a position not denied by the respondent's counsel—I think it must follow that these Courts have no jurisdiction to try trespass *quare clausum fregit* where the plea is *liberum tenementum*, and I therefore overrule the demurrer.

W. L. Holokahiki and J. M. Poepoe, for petitioners.

Kinney and Peterson, for respondents.

Honolulu, December 20th, 1884.

EMMA M. BECKLEY vs. C. AFONG *et al.*

IN EQUITY. BEFORE JUDD, C.J.

DECEMBER, 1884.

A decree of the Probate Court was made in June, 1859, ordering that the guardian *ad litem* of a minor convey the minor's estate: on a petition by the minor to set this decree aside, made in April, 1884, held, that the plaintiff is not barred by the statute of limitations, because she married before she attained majority, and the disability of coverture was not removed till her husband's death in 1881.

The minor, being a trustee at the date of the decree of 1859, was not entitled to her day in Court, after her majority, to disaffirm.

A decree made by consent of counsel, without fraud or collusion, cannot be set aside.

The purchaser, at an administrator's sale of real estate, made by order of a Probate Court, held to be a *bona fide* purchaser without notice, as against the claim of an heir to the estate, made ten years after such sale, that the sale was in fraud of her rights.

DECISION OF JUDD, C.J., ON DEMURRER.

I adopt the following summary of the bill in this case, taken from brief of defendant C. Afong's counsel.

"The bill of complaint recites a bill in equity by plaintiff's father, T. Metcalf, filed before the Chief Justice of this Court, June 27th, 1859, setting forth that in the year 1852 he applied to the Minister of the Interior to purchase of the Hawaiian Government a large tract of land for agricultural purposes, and that as it was the policy of the Government to refuse patents for large tracts of land to persons of foreign birth, except under special circumstances, he applied for and obtained a grant or patent of this land to be made to his infant daughter Emma, by a Hawaiian mother, which was made September 2d, 1852, he paying therefor \$1040, and that his daughter, then five years old, received the title in said patent in trust for him and for no

other purpose, and not as an advancement or gift; that he had since been and then was in possession of the premises; that he desired to raise money on mortgage of the land in order to improve the property and secure a crop of sugarcane thereon; that his said daughter was then only above twelve years of age, and that he prayed a guardian *ad litem* for her be appointed, and summoned to appear and show cause why the prayer of his petition should not be granted; and that she be decreed to release and convey to him in fee her title in said land; that James W. Austin was appointed as such guardian, who filed an answer admitting the facts so alleged, and a decree was made therein July 1st, 1859, directing said guardian to convey her said title to said petitioner, but that no day was given her to answer after she became of age.

That the said guardian's answer amounted to a confession of the said bill, which he had no authority to make; that said Chief Justice should not have made said decree until she became of age, and that the same was contrary to law and a fraud upon her, whereby she was unjustly deprived of her property; that the same was purchased with her money, and no trust executed in favor of said T. Metcalf as above-named; that plaintiff was married from the age of twenty years until 1881, and was unacquainted with her rights in the premises; that her husband died in 1881, and the premises were devised to her by her father, and she has always heard and believed that her only title was under his will.

That the premises were sold October 10th, 1874, by her father's administrators, to said C. Afong, who purchased 'with notice of plaintiff's title,' and that the proceeds of said sale were applied to payment of her father's debts.

The plaintiff and the other defendants are the heirs-at-law of her father.

Plaintiff prays:—1. For process. 2. For a decree vacating said decree. 3. That said administrator's sale be set aside, and said C. Afong ordered to convey all his estate in said premises to the plaintiff. 4. That the residue of the said estate be

applied to repay the purchase money of the premises to said C. Afong. 5. For general relief."

It thus appears that the plaintiff seeks to vacate a decree made in this Court in 1859, by which her guardian *ad litem*, she being a minor, was required to convey her title and interest in certain land to her father, the late T. Metcalf.

The plaintiff attacks the decree on the ground that it did not give her (the minor) a day in Court to answer after coming of age, and because the guardian in his answer admitted the facts against her, which he had no authority to do.

The bill is demurred to by C. Afong, who contends that the plaintiff is barred by the Statute of Limitations. I do not think she is. Equity will act in obedience to and in analogy to the Statute of Limitations in proper cases, and will also recognize the disabilities which suspend the running of the statute.

The plaintiff was, in 1859, when the bill against her was filed, twelve years of age. The disability of infancy was not removed until 1867; the period being twenty years for both sexes by the Statute of Limitations of 1870, Section 4. But the plaintiff had married before becoming twenty years of age, and was under the disability of coverture till 1881, when her husband died. As I understand the statute, she has five years from the last date in which to bring her action.

But is the decree reversible for the causes alleged in the bill?

In the original suit it was alleged that the title of the land was put in the name of the minor, who was Hawaiian born, in order that the grant might be made, as it was the policy of the Hawaiian Government at that time not to issue patents for large lands to foreign-born applicants, and that the minor received the title in trust for her father, and not as an advancement or gift. It is not questioned that the Court had jurisdiction of the case.

A case very closely analogous to this is *Walsh vs. Walsh*, 110 Mass., 381. Here the errors assigned in the original decrees were:

"1. That two of the defendants were infants, and that the

decrees were made against them without giving them a day after their coming of age to show cause against the same.

"2. That the decrees appear to have been made by consent of their guardian *ad litem*, and upon the representation of counsel, without proof."

Gray, C. J. says: "The ancient rule of practice in chancery which allows to an infant a day after coming of age to answer a bill against him during his minority, does not apply to infant trustees. In our case the Court found the infant to be a trustee, and there was therefore no occasion to give the infant a day, and the decree complained of is not, on this account, erroneous."

This Court adopted this principle of law in its decision in the demurrer in *Macfarlane vs. Spencer*, 12 December, 1881 (not published).

As to the second point. The case of *Walsh* further decides, p. 383, that "if the Court does pronounce a decree against an infant by consent, and without inquiry whether it will be for his benefit, he is as much bound by the decree as if there had been a reference to a master and a report by him that it was for the benefit of the infant. The case falls within the general rule that a decree made by consent of counsel, without fraud or collusion, cannot be set aside by rehearing, appeal or review." Many cases are cited in support. The Court says: "In the case before us, the first decree appearing upon its face to have been made not upon the consent of the defendant and the guardian *ad litem* merely, but upon representation of counsel and adjudication of the Court that it was a decree fit and proper to be made upon the infants, it must be held binding upon them."

The difficulty in the present case is that the decree attacked and the record in the case are not set forth in the bill, and are not properly before me, and I am not at liberty on this demurrer to ascertain if the decree was procured upon the representation of counsel and adjudication of the Court that it was a fit and proper one to be made. On the contrary, the bill alleges that the decree was contrary to law, and operated as a fraud upon the plaintiff.

For this reason I am obliged to overrule the demurrer in order that upon answer and proofs the exact condition of the original case can come before me.

In reference to the effect of the administrators' sale of the land in 1874, I do not think the bill is demurrable on this account, as it alleges that Afong was a purchaser with notice of plaintiff's title, and whether he was or not is a matter of evidence.

I deem it unnecessary to pass upon the other points raised, for if, on a final hearing, the original decree shall not be reversed, the defendants Metcalf, Rowland and Prosser will not be required to contribute towards repayment of the purchase money to the defendant C. Afong.

Demurrer overruled: Answer in fourteen days.

Honolulu, April 2, 1884.

DECISION OF JUDD, C. J. ON THE MERITS.

A demurrer in this case was overruled April 2d, 1884.

Referring to my decision on the demurrer for a statement of the bill, it now becomes necessary to consider the case upon the further pleadings and proofs.

The plea and answer of C. Afong makes profert of the proceedings had in 1859 before the acting Chief Justice in the case of Theophilus Metcalf against Emma Metcalf, the present plaintiff, and avers that the record shows no fraud, collusion or error in law, and that the decree therein is final and conclusive upon the plaintiff. It also pleads the records of the Probate Court and shows that on the 6th day of July, 1874, the administrator with the will annexed of the estate of Theophilus Metcalf, deceased, filed his petition for sale of the real estate of the decedent for payment of his debts; that an order was made appointing a time for hearing and for those interested to show cause why the same should not be granted; that at the hearing it was proved that notice had been served on the plaintiff, that she appeared by counsel and opposed the granting of the petition, and after full hearing, an order of sale was made by the Probate Court on the 17th day of September, 1874, and that

after the sale had been made, the administrator filed his petition for confirmation and for authority to execute a deed of conveyance therefor to this defendant, and that after notice to the plaintiff, an order confirming such sale and authorizing the conveyance was made; that plaintiff appeared personally or by counsel at all said hearings, and that she is precluded by the orders therein from now contesting said sale; also, that defendant paid \$66,600 for the land sold to him, and that at or before the execution of the deed he had no notice that the claim of the plaintiff that the decree of July 1st, 1859, in Chancery, was contrary to law, or that the same defrauded her of her property, or that she claimed to be the legal or equitable owner of the real estate otherwise than as a devisee thereof under her said father's will, and that defendant never had notice of plaintiff's claim until immediately before the filing of this bill. The answer further specifically denies or admits or avoids the allegations in the bill.

It is necessary to restate a few of the facts of this case. In 1852 Theophilus Metcalf bought of the Government the land of Kaupakuea and procured the Royal Patent therefor to be made in his daughter's name (the present plaintiff). In 1859, in pursuance of a decree of Mr. Justice Robertson, acting Chief Justice of the Supreme Court, this land was conveyed to Mr. Metcalf by the guardian *ad litem* of the plaintiff. Mortgages were made by Mr. Metcalf on this estate, upon which was conducted a sugar plantation. Mr. Metcalf died, heavily indebted, in 1870, leaving by will this land to his daughter the plaintiff. The real estate of decedent, including the land in question, was sold in order to satisfy the debts of the decedent, by order of the Probate Court, before which Court the plaintiff appeared and contested many points, but said nothing as to the present claim that the decree of 1st of July, 1859, was a fraud upon her rights and contrary to law. If she had at this time knowledge that the patent of the land of Kaupakuea was in her own name and had been improperly conveyed to her father, it would have been her duty to make the objection then. But she says in evidence she supposed up to that time that her only title to the land was by virtue of the devise of her father, and that she ascertained

the facts now presented in her bill after the administrator's sale to the defendant, Afong. There is no proof that the defendant Afong had any direct notice of her claims upon this land except as made to him by plaintiff in conversation. But this conversation was subsequent to the administrator's deed, as it was only then that the plaintiff herself knew the facts she communicated to Afong.

So far then as direct knowledge of this claim is concerned, Afong had none when he bought this land. But it is urged that Mr. Afong took by the administrator's deed whatever estate Mr. Metcalf had and no more, and that he is charged with notice of the record of 1859.

It is to be presumed that the deed of the guardian *ad litem* to Theophilus Metcalf, in pursuance of the decree, is on record. But there would be nothing in this to put the purchaser on inquiry as to the alleged fraud and illegality of the decree obtained fifteen years previous.

I am of the opinion that Mr. Afong must be regarded as a *bona fide* purchaser for value, without notice of the matter now set up against the decree, and as this is conclusive of the case, I do not deem it necessary to pursue further the inquiry whether the original decree is now reversible.

Bill dismissed.

F. M. Hatch, for plaintiff.

A. S. Hartwell, for defendant Afong.

Honolulu, December 23, 1884.

CHUNG WA *vs.* SING KWONG WO CO.

ASSUMPSIT. BEFORE McCULLY, J.

DECEMBER, 1884.

New partners, taken into a firm after the making of a note by the firm, held not to be liable on the note, there being no proof of a new promise by them to pay it.

DECISION OF McCULLY, J.

The plaintiff claims upon a note for \$50, money loaned the defendant in March, 1883. The controversy concerns the liability of a partner named Goo Yuk, who has come into the firm since the note was given, under circumstances and facts, as I find them, as follows:

The firm or "company" as the Chinese style it, was originally constituted of Ying Kwai and Alaiu and two others (who appear to have dropped from the company in some way not explained in the testimony), dealing in Chinese groceries. They were doing a business large in proportion to their capital. About August, 1883, Ying Kwai, as he delicately expresses it in his own testimony, got into trouble about opium and was absent from the store for six months, *i.e.*, he served a six months' term of imprisonment for illicit dealing in opium. The firm was insolvent at this time. At a meeting of creditors it was agreed that the creditors signing would cut down their claims to fifty per cent on condition that Goo Yuk would become responsible for the payment. This liability extended to and was limited to all debts according to the books of the company, and all notes which should be endorsed by Goo Yuk. Chung Wa did not place his claim nor join in the agreement upon which Goo Yuk undertook his liability. Goo Yuk had previously paid into the firm \$1000 "as capital," and also remitted to Hong Kong \$1000 for goods "as a loan" in contemplation of entering the firm.

In pursuance of the arrangement of composition with the

creditors, Goo Yuk paid over \$11,000, of which the larger part was receipts from outstanding accounts, but made up the balance by his own funds.

The plaintiff's note is not endorsed by him nor was it entered in the books. The plaintiff's testimony is that Goo Yuk promised him to pay it several times when demand was made. Goo Yuk's testimony is to the contrary. I take the latter to be true as more consistent with the whole arrangement of the affairs of this concern. The plaintiff appears by something said in testimony, but not fully elucidated, to have considered that his note for cash loaned had some preference and stood upon another footing from the general claim of creditors, because it was made under the auspices of some "loan company."

On the above finding of facts the law seems to be clear that Goo Yuk and the other new members of the firm are not liable to the plaintiff. The presumption of law that they are not has not been removed by proof of the contrary intention and agreement.

To charge the firm it should be established that a new promise has been made by the entire new firm with the consent of the old partners as well as of the creditor, which will constitute novation of the debt. Story on Part. Sec., 153.

There is no proof of any consideration moving from the plaintiff, no forbearance, but a careful exclusion by the plaintiff from all the considerations moving the defendants to assume liability. The mere circumstance of a new partner coming into the firm is not of itself a ground for inference that he has assumed liability for the old debts. Parsons on Partnership, p. 433; *Saville vs. Robertson*, 4 T. R., 720.

This case, being on a note for money loaned, forming a detached transaction, is a clear one for the application of the rule of non-liability of incoming partners, for it forms no part of a running account, and moreover has not been entered in the firm's books.

My judgment is for the defendants, in the form of non-suit for

misjoinder of the new partners and non-joinder of the partners who made the note.

F. M. Hatch, for plaintiff.

W. R. Castle, for defendants.

Honolulu, December 23d, 1884.

C. BREWER & CO. *vs.* G. H. LUCE, Tax Collector.

ASSUMPSIT. BEFORE JUDD, C.J.

FEBRUARY, 1885.

The "reserve fund" of a corporation, consisting of credits, is not taxable.

Sugar was laden on a vessel at Honolulu prior to July 1st, and the bills of lading signed and mailed to foreign consignees: the vessel sailed from Honolulu at noon of July 1st: held, that the sugar was, for purposes of taxation, still in the possession and control of the shippers, and taxable to them.

DECISION OF JUDD, C.J.

The plaintiff corporation claims to be refunded taxes paid under protest, as follows: \$172.50 for taxes on \$23,000 assessed 1st July, 1884, as "reserve fund" of the plaintiffs.

Mr. P. C. Jones, president of the plaintiff corporation, testified that this amount appeared on its books as a credit derived from accumulated commissions, interest, dividends and other profits. That it was not regarded as cash and was not in the safes of the corporation or in the bank, but was invested in other accounts, and to realize upon it a collection would have to be made from some one who owed the corporation on this account. This explanation makes it plain that the "reserve fund" was simply credits, or debts due the corporation. It has no concrete existence and is not by the law now in force taxable property, and comes within the principles of *McBryde vs. Kala*, decided by me in September last. (*Ante* p. 529.)

On this count judgment must be for the plaintiff.

The second count in the declaration is for \$215.66, taxes on \$28,754 worth of sugar shipped on board the American S. S. Alameda.

It is in evidence that there had been shipped by plaintiff corporation on board the Alameda some 5485 bags of sugar. The bill of lading is dated 28th June, 1884, and I think the proofs make it certain that it was all laden on board the vessel before the 1st July. The vessel sailed at about noon of the 1st July. The sugar was proved to be the property of some eight different corporations and individuals, of whom the plaintiff corporation was the agent, and was consigned to Welch & Co., of San Francisco, to whom the bill of lading had been mailed.

It is contended by plaintiffs that this sugar is not taxable:

1st. Because it was not the property of the plaintiff, but was the property of corporations which have corporate existence within this Kingdom, and of individuals within this Kingdom.

2d. Because the sugar, being laden on board of a foreign vessel, is not, in contemplation of law, within this Kingdom.

3d. Because the sugar was not in the possession, custody or control of the plaintiffs.

In my opinion, Sec. 32 of the Act of 1882, as well as other sections, make property assessable to the persons in whose possession or control it may be on the 1st of July of each year. The duty of ascertaining who the true owner may be is not cast upon the assessor. The law imposes taxes in *rem* and the *res* is taxable in the hands of the person holding it, and the collector need not look further. To require that each assessor should try and pass upon titles to personal property and decide correctly at the peril of losing to the State the tax upon it, would operate to encourage evasions and consequently to place heavier burdens on the honest. I think sugars in the hands of a corporation acting as a commission merchant or plantation agent are properly taxable to it.

The sugar was within this Kingdom, although laden in the hold of an American steamship. Any other construction would admit of articles of great value being placed on board of a

foreign vessel in the harbor on the 30th June, and returned on shore on the 2d July, and thus escape taxation. The case cited, *Crapo vs. Kelley*, 10 Wallace, 610, does not apply. This was a question whether the transfer of all the property of a debtor resident in Massachusetts, by a Judge of the Insolvent Court, passed the title to his assignee in insolvency of a ship then on the high seas. The Court held that for the purposes of this suit the ship, though on the high seas, was a portion of the territory of Massachusetts, and the title to her passed with the like effect as if she were physically within the limits of the State of Massachusetts, and so a subsequent attachment on her arrival in the port of New York was invalid.

The sugar, though its bills of lading were mailed to the consignees in a foreign port, was, for the purposes of taxation, still in the possession and control of the shipper.

On this count judgment must be for defendant.

W. R. Austin, for plaintiffs.

Attorney-General Neumann, for defendant.

Honolulu, February 6th, 1885.

BERNICE P. BISHOP *et al.* vs. LOKANA *et al.*

TRESPASS. BEFORE JUDD, C.J.

FEBRUARY, 1885.

An action of trespass *quare clausum fregit*, held to abate upon death of plaintiff.

DECISION OF JUDD, C.J.

This is an action of trespass wherein five hundred dollars (\$500) damages are claimed for breaking and entering the fishery appurtenant to the Ahupuaa of Moanalua, the property of the plaintiffs, and taking fish therefrom.

The action was commenced on the 3d of October, 1884. During that month Mrs. Bishop died, and her executors appeared

on the 15th December and filed in Court a suggestion of her death, and prayed that the suit might proceed to final judgment.

At the January term, 1885, the defendants move that the appearance of the executors be set aside on the ground that the cause of action declared upon does not survive to the executors.

The Act of 1876 (Compiled Laws pp. 385-6) provides the method to be pursued in proceeding with an action after the death of the plaintiff or defendant. But it seems to me from the language and intent of the Act that this procedure is only applicable to such actions as survive to the personal representatives of the deceased, that is, such actions as might originally be maintained by the executor or administrator.

The action in question appears to me to be trespass *quare clausum fregit*, and the taking of fish is alleged by way of aggravation. Actions for injury to real estate do not survive to the executor or administrator, for the real estate passes to the heir or devisee, and not to the personal representatives.

The maxim applicable is *actio personalis moritur cum persona*, and is peculiarly applicable to actions in form *ex delicto*. Actions in tort, founded on malfeasance or misfeasance to the person or property of another, are annexed to the person and die with him, except where the remedy is given by statute to the personal representatives. Broom's Legal Maxims, star page 706.

It required the enactment of a statute in England (3 and 4, Wm. 4, C. 42) to enable executors or administrators of a person deceased to maintain trespass for injury to the real estate of such person committed in his life-time. This statute limits the right of action to an injury committed within six months before the death of such person, and requires the action to be brought within one year after the death of such person.

In Williams' Executors, p. 870, the text reads: "Since actions founded on wrongs to the freehold do not survive, it is clear that the executor cannot (unless by virtue of the new statute just cited, 3 and 4, Wm. 4) maintain trespass *quare clausum fregit*."

Whether the executor may have trespass *de bonis asportatis* or can maintain an action for money had and received (the proceeds of trespass), waiving the tort, it is not necessary for me here to decide.

It is suggested that the object of this action is to try the title. This cannot well appear until the plea is made. And if it were, I should say that the devisee is the more appropriate one to bring the action, if the trespass still continue.

It is perhaps to be regretted that the Act of 1876, on abatement of actions, did not specify what actions may be maintained by executors and administrators, but as they are not specified, the only safe course is to discriminate according to the principles of the common law.

I notice in *Kake vs. Horton*, 2 Haw., 213, that this Court doubted whether the administrator could maintain an action of damages on the death of a person, but allowed the widow to maintain the suit.

I think this action has abated, and grant the motion to set aside the appearance of the executors.

F. M. Hatch, for plaintiffs.

E. Preston, for defendants.

Honolulu, February 11th, 1885.

R. A. MACFIE *vs.* H. HACKFELD & CO.

ASSUMPSIT. BEFORE JUDD, C.J.

MARCH, 1885.

Contracts of sale of a sugar plantation construed to mean that all indebtedness of the plantation, prior to July 1st, 1883, was to be assumed by defendants: and plaintiff held entitled to recover back all of such amount paid by him on plantation account.

DECISION OF JUDD, C.J.

The plaintiff, who is a resident of Dregghorn, Scotland, claims of H. Hackfeld, P. Isenberg, H. W. Schmidt, H. F. Glade, J. F.

Hackfeld and J. C. Pfluger, doing business at Honolulu under the firm name of H. Hackfeld & Co., the sum of \$8,165.77 for so much money had and received by defendants to plaintiff's use, according to an account annexed to the complaint.

The defendants plead the general issue.

The plaintiff introduced in evidence, upon which his case is founded, a proposition in writing dated London, July 21, 1883, from J. C. Pfluger and Paul Isenberg, of the firm of H. Hackfeld & Co., of Honolulu, to R. A. Macfie, and accepted by him, in which the defendants offer to sell to Macfie all their interest of every sort in the "Kilauea Sugar Company" and current account, "including all debts due us by your son Robert (R. A. Macfie, Jr.)" as these stood on the 1st instant, for the sum of \$150,000, &c. Among other things the agreement recites, "Your acceptance of the foregoing hands over to you the 151 shares now held by us, and the leasehold interest appertaining to the half-moiety acquired by your son, and releases the 'Macfie holdings,' entirely from all liabilities anterior to July 1st, whether by mortgage or otherwise, so as to give a fresh clean start, which we will do our utmost to make prosperous by our advice or assistance if desired." It further stipulated that "This proceeding is to be communicated to our firm at Honolulu by mail and cable as soon as possible; should, however, our interests have been sold by our firm before the receipt of the cablegram, this transaction will be null and void."

Just before the receipt by the defendants in Honolulu of the cablegram conveying notice of this transaction, they had sold their interests in the Kilauea Sugar Company to Wm. Y. Horner, of Lahaina.

After considerable negotiation extending over some time, Mr. Horner agreed to sell his interest to Mr. Macfie (plaintiff) in order that the firm might carry out the "London agreement." The agreement of sale is dated 10th January, 1884. It stipulates that Horner is to sell to Macfie his interest in the Kilauea Sugar Co., and that in consideration of said sale and of the London agreement, Macfie shall pay to H. Hackfeld & Co., of Bremen,

one hundred and fifty thousand dollars (\$150,000) and interest from 1st July, 1883; and Macfie is to pay Horner \$25,000, and to H. Hackfeld & Co., of Honolulu, \$62,940.02, adding thereto \$1,800 or thereabouts, representing the amount of drafts now extant and not yet entered in the account current between the Kilauea Sugar Co. and H. Hackfeld & Co., dated from and after the 1st July, 1883, and subtracting therefrom \$6,000 or thereabouts, representing the credit due to the said account for some 1063 bags of sugar received on account by H. Hackfeld & Co., from the Kilauea Sugar Co., and not entered upon account current. It was also agreed that all necessary instruments and releases were to be executed and deposited with Messrs. Bishop & Co., bankers, as an escrow to be delivered to the respective parties upon the payment of the \$150,000. Other stipulations appear which it is not necessary to recite, and the agreement closes: "It is lastly agreed that all disputed items in the account current herein mentioned shall be submitted to arbitration, but nothing herein contained shall imply that any of the payments hereunder to be made shall be put off by reason of such disputes, but the same shall be made as though no dispute existed."

On the 15th January, 1884, the formal deed was signed by all the parties—Horner, Macfie, H. Hackfeld & Co., and Macfie, Jr.

The clause bearing upon the question before me is as follows: "And the said parties of the third part (H. Hackfeld & Co.) agree to and with said party of the second part (R. A. Macfie) that the above sale shall take effect as far as they are concerned as of July 1st, A.D., 1883, according to the terms of an agreement made by and between said parties in London, dated July 21st, A.D., 1883, and that all accounts shall be settled as of said July 1st; all sugars which may have been shipped from the plantation of said Kilauea Sugar Co. on or before said July 1st, as well as all sugars which may have been received by said parties of the third part at Honolulu and are not accounted for in their quarterly account of that date, are to go to reduce the balance due them of that date; and all indebtedness and

liabilities of said Kilauea Sugar Company existing anterior to July 1st, A.D., 1883, whether by mortgage or otherwise, are to be assumed and borne by said parties of the third part, and said parties of the third part do hereby assume the same; all amounts which have been advanced by the said parties of the third part to said Kilauea Sugar Company since July 1st, A.D., 1883, for the use of the company, and none other, are to be paid by said party of the second part; and said parties of the third part hereby acknowledge the receipt from said party of the second part of the sum of \$62,946.12, being the balance appearing in favor of said parties of the third part on this date as charged in their account current, less sugars received, but said account current and the payment of said last-named sum on account thereof are not to be taken as final, and any disputes arising in regard to said account, or in regard to the transaction covered by this indenture, are to be referred to arbitration," etc.

At the same time Macfie, Sr., and Macfie, Jr., and the Kilauea Sugar Co., by W. Y. Horner (President), released and discharged H. Hackfeld & Co. of all manner of debts, claims, demand and liability whatsoever in law as well as in equity, which they now have or which may hereafter accrue to them respectively by reason of any matter, thing, transaction or business from the beginning of the world to the date of these presents, excepting, however, from this release, such matters pertaining to the book-debt due from the Kilauea Sugar Co. to said H. Hackfeld & Co. from and after the 1st day of July, 1883, and such awards as may hereafter be made between them (H. Hackfeld & Co.) and the undersigned in conformity with a certain contract of sale between parties hereto dated the 15th day of January, 1884.

The plaintiff's bill of particulars is composed mainly of items of indebtedness by the Kilauea Sugar Co. prior to 1st July, 1883, and which were paid by H. Hackfeld & Co., as agents of the company, and in the first instance charged in the accounts current and repaid by Macfie in the settlement of 15th January, 1884, and included in the sum of \$62,940. One item will suffice

to illustrate the general character of the transactions. In the account current there is charged as paid by H. Hackfeld & Co., July 10, 1883, draft No. 121, favor of Keaka, for \$149.50. This draft was drawn by the manager of the Kilauea Sugar Co., June 30, 1883, favor of Keaka for balance of contract for hauling cane. This is clearly an indebtedness of the Kilauea Sugar Co. existing anterior to July 1st, and is what Messrs. Hackfeld & Co. bound themselves to repay. The language of the deed of January 15 is conclusive on this matter. They covenant that "all indebtedness and liabilities of the Kilauea Sugar Co. existing anterior to July 1st, A.D., 1883, are to be assumed and borne by them, and that they do hereby assume the same." These words are susceptible of but one meaning, and the meaning is not that whatever sums of money have been actually paid by H. Hackfeld & Co. on account of the Kilauea Sugar Co. are to be borne by them, but they mean that H. Hackfeld & Co. agree to assume and bear all the indebtedness of the company existing prior to 1st July. And if Macfie had borne any of these in the amount of \$62,940.02, paid by him without prejudice in order to facilitate a settlement of the title of the plantation, he was to have them paid back. The language of the deed is that the payment of \$62,940.02 is the balance appearing in favor of Messrs. Hackfeld & Co., but said account current and the payment of said last-named sum on account thereof "are not to be taken as final," and any disputes arising, etc., are to be referred to arbitration. No question is here made of the right of the plaintiff to sue at law to recover these sums in default of submitting the matter to arbitration.

The previous agreement of 10th January between Horner and Macfie, in which H. Hackfeld & Co. join, is not so specific. It would, doubtless, when considered alone, not bear the interpretation that liabilities of the Kilauea Sugar Co. incurred prior to 1st July, 1883, were to be borne by H. Hackfeld & Co., for the payment of \$62,940.02 is subject only to correction by adding drafts dated from and after 1st July, 1883, to the amount of \$1800 or thereabouts, and by deducting the proceeds of some

1063 bags of sugar, about \$6000. The views of the individual members of the firm of H. Hackfeld & Co., who testified as to their understanding of the final agreement, correspond well with the language used in this agreement of January 10. But it was only an agreement to sell and was succeeded by the formal instrument of sale of January 15. This was their final act and must determine the rights of the parties. The language of the deed is plain and unequivocal and free from ambiguity, and must be interpreted by the Court according to its own terms, having no reference to the parol evidence which was offered showing a different understanding by some of the parties.

The release, executed contemporaneously, excepts from its own operation "such matters pertaining to the book-debt due from the Kilauea Sugar Co. to H. Hackfeld & Co., from and after the 1st day of July, 1883, and such awards as may hereafter be made between H. Hackfeld & Co. and Macfie in conformity with the contract of sale of January 15." Thus the right which Macfie reserved to himself in the deed of January 15 to recover sums paid by him in the settlement, being indebtedness of the Kilauea Sugar Co. existing prior to July 1st, 1883, was excepted in the release, and he has not acquitted it to the defendants.

Having no doubt as to the principles of law involved, I think judgment must be entered for the plaintiff for the sum declared on as set forth in the bill of particulars as far as and including the item "Keaka \$149.50," in all amounting to \$6,729.46.

Of the remaining items, I disallow "error on Invoice December, \$75," as being no error; also, item paid Cecil Brown \$25, of which there is no proof; also, order No. 119 paid by G. W. Macfarlane & Co., for \$40, and not recoverable in an action for money had and received by these defendants.

Interest is allowed at 9 per cent. per annum on all items from time of payment of each to August 1st, 1883, and after this to the 10th January, 1884, at 8 per cent. per annum, this being the interest that was charged to and by the plaintiff in his settlement; and also interest on the whole sum recovered at 9 per

cent per annum from the date of demand, which is July 31st, 1884.

The bill of particulars also claims items amounting to \$400, being fees paid to counsel by H. Hackfeld & Co. subsequent to 1st July, 1883, and claimed by plaintiff as being improperly chargeable to the Kilauea Sugar Co. The case was a bill in equity by R. A. Macfie, Jr., vs. Horner and the Kilauea Sugar Co., its object being to compel Horner, as the holder of a debt owing by the Kilauea Sugar Co. of which Macfie was surety, to exhaust his remedies against the Company before resorting to him. The Kilauea Sugar Co. was impleaded and the prayer of the bill was that it might be ordered to give plaintiff indemnity, and be enjoined from selling or disposing of the property until it had provided indemnity, etc. From this statement it is sufficiently plain that the Kilauea Sugar Co. had a substantial interest to defend and which required the aid of counsel. As I find that the expenditure for counsel was in the interest of the Kilauea Sugar Co., I disallow these items.

Judgment as above.

F. M. Hatch, for plaintiff.

Paul Neumann and Smith & Thurston, for defendants.

Honolulu, March 11th, 1885.

W. H. HOLMES vs. J. H. SOPER.

ASSUMPSIT. BEFORE AUSTIN, J.

MARCH, 1885.

An execution must be postponed to the lien of a prior attachment.

DECISION OF AUSTIN, J.

This is an action for money had and received.

It is undisputed that the defendant, who is Marshal, received the sum of \$2,062.13, the amount claimed by plaintiff, upon certain attachments and executions against one Ah Hong.

The plaintiff had two attachments and two executions on judgments entered on said attachments, which sum up the amount he claims.

One Ho Sam had an execution against Ah Hong, issued October 30, 1884, upon judgment confessed and entered October 29, 1884.

The executions of plaintiff were subsequent to that of Ho Sam on the same day. The plaintiff's attachments were levied long prior to the issuing of Ho Sam's execution.

The question is as to priority of lien between prior attachments and a subsequent execution. Section 1124 of the Civil Code provides that in all cases of attachments, "all after leases, mortgages, sales, bequests, assignments, trusts, or other conveyances of said property (attached), until the dissolution of the process, shall be void in law as against the plaintiff in such cases." Section 1021 of the Civil Code provides: "Every officer receiving a writ of execution issued in due form by any Court, or justice, shall note thereon the day and hour of its receipt, and he shall give priority in levying upon property of the defendant in execution, to the writs received by him according to the order of time in which they are received."

The object of an execution is to collect the money on a judgment by a levy on and subsequent sale of property of the defendant in the execution. Such a sale would be void as to any prior attachments under Section 1124, until the dissolution thereof, and if the sale under such execution would be so void, then the execution itself must be postponed to the lien of the attachments.

The plaintiff's attachments were never dissolved. This necessitates judgment for the plaintiff for the amount he claims and costs.

In analogy to the laws of many of the United States, the plaintiff's subsequent executions might be held, if necessary, to relate back to the time of the issue of the attachments on their judgments respectively.

Let judgment be entered for the amount claimed with costs.

Kinney & Peterson, for plaintiff.

W. R. Castle, for defendant.

Honolulu, March 23d, 1885.

KAINAPAU *vs.* KUKII.
IN EQUITY. BEFORE JUDD, C.J.
APRIL, 1885.

The vendor of land has no implied lien for the unpaid purchase price, as against the vendee and a subsequent purchaser with notice.

DECISION OF JUDD, C.J.

It is averred in this bill that plaintiff conveyed the land in question on the 23d of April, 1878, for the consideration of \$50, which was not in fact paid; that his grantee, shortly before his death in 1884, conveyed this land to defendant for the nominal consideration of \$1 and natural love and affection; and that defendant knew at the time he received his conveyance that the purchase money had not been paid to plaintiff, and that defendant has since refused to pay the purchase money, but has offered to pay \$30 in respect and in full consideration of plaintiff's claim; and prays that it may be declared that plaintiff has a lien on the land for the purchase money and interest; and that defendant may be decreed to pay the same, and in default that the land may be sold, &c.

The defendant demurs and submits: 1st. That there is no vendor's lien on the land for unpaid purchase money in this country, and the Court should not now declare it to exist. 2d. The bill discloses laches on part of plaintiff which should defeat his claim. 3d. The lien, if it exists, is barred by the statute of limitations. 4th. The vendor's lien has no existence until so declared to exist by a Court of Equity, and if the debt has meanwhile been barred by the statute, there can be nothing to establish the lien for.

BY THE COURT.

I am asked by the plaintiff to declare that a vendor has an implied lien upon the land sold by him, for the purchase money, as against the vendor and a subsequent purchaser with notice. After a somewhat extended examination, I think Mr. Pomeroy is

right when he says that "no single topic belonging to the equity jurisprudence has occasioned such a diversity and even discord of opinion among the American Courts as this of the grantor's lien." 3, Pomeroy's Eq. Jur., §1251.

Chancellor Kent (4 Kent's Com. 152) says: "The vendor of real estate has a lien, under certain circumstances, on the estate sold, for the purchase money. The vendee becomes a trustee to the vendor for the purchase money, or so much as remains unpaid, and the principle is founded in natural equity and seems to be inherent in the English equity jurisprudence."

Story, in his work on Equity Jurisprudence, says: "The principle upon which Courts of equity have proceeded in establishing this lien in the nature of a trust, is that a person who has gotten the estate of another ought not, in conscience, as between them, to be allowed to keep it, and not to pay the full consideration money. A third person, having full knowledge that the estate has been so obtained, ought not to be permitted to keep it without making such payment, for it attaches to him also as a matter of conscience and duty. 2 Story's Eq. Jur., §1219.

Lord Eldon, in the leading case *Mackreth vs. Symmons*, 15 Ves., 329, says: "Upon principle, without authority, I cannot doubt that it goes upon this, that a person having got the estate of another shall not, as between them, keep it and not pay the consideration." But Lord Eldon himself doubts the wisdom of the rule and says "it would have been better at once to have held that the lien should exist in no case," etc.

Chief Justice Gray, in *Ahrend vs. Odiorne*, 118 Mass., 264, effectually disposes of the reasoning of Lord Eldon. He says: "The theory that a trust arises out of the unconscientiousness of the purchaser would construe the non-performance of every promise, made in conveyance of property to the promisor, into a breach of trust; and would attach the trust not merely to the purchase money which he agreed to pay, but to the land which he never agreed to hold for the benefit of the *cestui que trust*."

The same judge also says that "the most plausible founda-

tion of the English doctrine would seem to be that justice required that the vendor should be enabled by some sort of judicial process to charge the land in the hands of the vendee as security for the unpaid purchase money. And the restriction of the doctrine to real estate suggests the inference that the Court of Chancery was induced to interpose by the consideration that by the law of England real estate could not be attached on mesne process, nor, except in certain cases, or to a limited extent, taken in execution for debt."

The principle contended for by plaintiff has been adopted by some States of the American Union and rejected by others, and in some, when recognized by the Courts, it has been abolished by statute. It has not been adopted by the Supreme Court of the United States except when established by the local law of the different states. *Jones' Mortgages*, §191. In the case of *Bayley vs. Greenleaf*, 7 Wheaton, 46, the Supreme Court of the United States held that a vendor cannot enforce his lien for unpaid purchase money against trustees for creditors of the vendee to whom the land had been conveyed, without notice of the lien. In this country, as in the United States, the policy of the law is to encourage the greatest freedom in the transmission of land. We have a system of registration where titles are spread for public view. Real estate is subject to attachment and sale upon execution, and the rights of grantees can be fully protected by mortgages.

I think the recognition of the doctrine that a vendor has a lien upon the land for the purchase money would be inconvenient, productive of litigation, and out of harmony with our real property laws, and accordingly sustain the demurrer on this ground.

It is not necessary to consider the remaining points.

E. Preston, for plaintiff.

Kinney & Peterson, for defendant.

Honolulu, April 3d, 1885.

ALOK *et al.* *vs.* R. GERKE.

IMPOUNDING. BEFORE JUDD, C.J.

JUNE, 1885.

Plaintiffs, on a country road, left their horses by the roadside and went into a restaurant: defendant impounded the horses, claiming that they were tied to his fence and had pulled the rails off:

Held, the horses were not estrays and were not liable to be impounded: and even if they were tied to defendant's fence and damaged it, the damage cannot be recovered under the statutory proceedings for impounding.

DECISION OF JUDD, C.J.

This is a statutory action to determine who shall pay pound fees and costs.

The undisputed facts are that plaintiffs and some others dismounted from their horses, which they had ridden from town, and went in to drink some tea at a Chinese restaurant at Moanalua, Oahu, and while there defendant seized the horses, demanded \$10 damages, and on plaintiffs refusing to pay, impounded them. The horses were released on an order from the Police Justice on the plaintiffs depositing with him the damages claimed and four dollars, the costs of a suit. The place where the horses were seized is the government road leading to Ewa and around the island. At this spot the road is fenced on both sides.

The defendant claims that plaintiffs tied their horses to his fence, and that they pulled back and tore several feet of it down, and that in order to repair it effectually, some twenty or twenty-five feet had to be rebuilt at a cost to him of \$15. The fence is of stone, and has posts through it eight feet apart, crossed by rails above the stone part.

The plaintiffs say they left their horses standing by the side of the road, and did not tie them to defendant's fence.

Taking the view of the testimony most favorable to defendant—that the horses were tied to his fence and on being startled

pulled back and tore some of it down—I do not think defendant's arrest of the animals was lawful. They were in the constructive custody of their owners, who had left them for the moment, and had them, as it were, under their eyes. A saddled horse which his owner leaves by the roadside for a temporary purpose cannot be considered as an estray. They were not "damage feasant" on the defendant's property. They were in the highway and not in that portion of the streets of Honolulu which would warrant their being arrested as estrays. I refer to the limited territory described in the law. These horses were some miles in the country beyond these limits.

Undoubtedly an ordinary action of trespass would lie for injury to a fence, but it is not a trespass within the statute respecting the impounding of animals.

For this reason I consider that the arrest and impounding of the plaintiffs' horses by defendant was unlawful, and affirm the judgment of the Police Magistrate in favor of the plaintiffs, the defendant to pay pound fees and costs.

F. M. Hatch, for plaintiffs.

W. A. Whiting, for defendant.

Honolulu, June 18th, 1885.

W. R. WATSON *vs.* T. AKANALIILII *et al.*

IN EQUITY. BEFORE McCULLY, J.

JUNE, 1885.

In an action for foreclosure of mortgage, against several defendants, one of them cannot plead as a set-off his claim for damages against plaintiff for breach of contract.

The mortgagee of a sugar plantation, who had made entry and carried on the plantation, held entitled to allowance for advances, commissions and interest.

DECISION OF McCULLY, J.

Bill for foreclosure of two mortgages held by the plaintiff by assignment.

The only points requiring particular consideration as being matters contested or claimed by the defendants are, first: The claim of one of the defendants, Akanaliilii, for damages for not carrying out an alleged contract of sale of these premises to him, June 10th, 1884, for the sum of \$80,000.

Section 1148 of the Civil Code: "If there are several plaintiffs, the demand set-off shall be due from them all jointly" (except dormant partners, by Section 1149): is cited against this claim. This enactment embodies a familiar principle of adjudication. If it were possible to entertain this claim and an amount of set-off were allowed, it would be equivalent to a judgment in favor of all the defendants for such amount, whereas the claim belongs to but one of them. Wong Sung, Assee and Achong would recover damages for the non-performance of the plaintiff's contract with Akanaliilii.

The case before us is distinguishable from those cases where the action is against a mortgagor and his surety on a bond secured by the mortgage, the bond in such a case being merely a security for the separate debt of the mortgagor, and a debt due the mortgagor from the plaintiff may be allowed in set-off. Jones on Mortgages, Section 1496.

Again, the statute concerning set-off limits it to a "plea of offset of the like kind and denomination, existing in the same right between him and the plaintiff:" Section 1146. The defendant Akanaliilii pleads damages for breach of contract, an unliquidated demand, against the amount of principal and interest on notes secured by mortgage.

Either of the above reasons seem to me sufficient to exclude consideration of the claim of offset, without discussing the further question of the jurisdiction of this Court in the matter.

The next point to be considered is the liability of the plaintiff to account as mortgagee in possession. The defendants claim that all moneys received from the sale of sugars are to be credited on their mortgage notes without deducting advances made by the factors or agents of the plantation; and that neither the plaintiff nor his agents can have commissions on advances, nor make any profit directly or indirectly which is

not to be credited to these defendants; that the mortgagor be not allowed to make a profit out of his possession, and that if more ought properly and reasonably to have been realized, the plaintiff is chargeable with the same.

Chapter 48 of the statutes of 1874, Compiled Laws p. 569, provides in Section 2, that the mortgagee in possession is authorized to make such expenditure as is necessary to carry on the estate or to keep the same in good condition, giving credit for the income, and the same shall be placed in the account for or against the estate as the case may be, if the mortgagor makes a tender for redemption.

It is claimed for the defendants that as the plaintiff did not enter according to the prescribed forms of the statute, he is not entitled to the benefit of the further statute provisions. But Sec. 2, as I have quoted, embodies so fairly the general rule as laid down by the authorities and writers—see Jones on Mortgages and Powell on Mortgages—that I deem it to be a proper rule for the Court in all cases of entry by the mortgagee. It seems to me to be reasonable in the case of entry upon a sugar plantation, to allow as part of the expenditure the advances made by the plantation agents, and it follows to allow also the usual commissions and interest on advances and on sales. The mortgages must have paid these. A principle governing these cases is that it is considered that it is by the default of the mortgagor that the mortgagee enters. He is not to be held to do better for the estate than the mortgagor. He is held to the exercise of the care and diligence of a provident owner, and is accountable only for rents and profits received, unless there has been wilful default or gross negligence on his part. Jones on Mortgages, 1123.

No suggestion has been made of expenditures other than for current expenses.

I do not know of any other point upon which I can make a rule for the guidance of a master examining the accounts, if it is desired that one be appointed. Such master would take proofs as to any alleged wasteful management.

When the account is settled, a decree will be signed in the usual form, for the foreclosure and sale of the premises, allowing the mortgagee to bid, and giving judgment to the plaintiff for any deficiency of the amount of sale to realize the sum found due.

F. M. Hatch, for plaintiff.

A. S. Hartwell, for defendants.

Honolulu, June 20th, 1885.

PAHUILIMA *et al.* *vs.* KELA *et al.*

IN EQUITY. BEFORE JUDD, C.J.

JUNE, 1885.

The Court declines to issue an injunction against proceedings in an action of ejectment: for although plaintiff in ejectment had delayed bringing suit for eighteen years, with full knowledge of adverse claims, yet his right to recover was a legal one and could only be barred by the full running of the statutory period of twenty years.

Temporary injunction granted against the ejectment suit, in order to allow the settlement of a question in the Probate Court as to a matter material to the action of ejectment.

DECISION OF JUDD, C.J.

The essential facts set forth in this bill are as follows:—

One Kauakahi, of Waipouli, Kauai, died in 1867, without issue, seized and possessed of certain premises situate at Waipouli, granted to him by Royal Patent No. 4855. He left a will devising a portion of the premises to one Pahuai, and a portion to one Debora, his wife. This will was partially destroyed by fire, but enough remained by which it could be identified, and within five years from the death of Kauakahi it was presented by Pahuai and Pahuilima to Circuit Judge McBryde, of Kauai, for probate. Judge McBryde was uncertain whether to admit it, and deferred judgment thereon, and was

thereafter taken with a lingering illness and died. Search has been made for the will by his successor, Judge Hardy, but no trace of it can be found. Since the death of Kauakahi, his widow Debora has occupied the portion of the premises devised to her, being the eastern half of the larger of the premises with a house thereon and a pond adjacent, until her death, and after her death her heirs-at-law have succeeded to the possession without opposition or interference from Pahuai or his representatives. That Pahuai has, without interference from Debora or her heirs, occupied since the death of Kauakahi the remaining portion of the premises, being the same as devised to him by the will of Kauakahi, until about a year ago, when he died intestate leaving the plaintiff Kapokalani, his grand-child and sole heir, in possession.

In March, 1885, the defendants, as heirs of Kauakahi, filed a complaint in ejectment against the plaintiffs to recover possession of this land. The bill further alleges that the defendants, living near by, knew of the death of Kauakahi, and the subsequent adverse occupation of a portion of the premises by Pahuai and the plaintiffs, and have never opposed nor disputed such occupation, nor claimed the premises until the suit in ejectment, and so the defendants are guilty of gross laches on the prosecution of their rights, and long and unreasonable acquiescence in the adverse possession of Pahuai and his heir, and should not be permitted to prosecute their claims at this late day.

And the bill further alleges that it is important to them and necessary in order to defend the ejectment suit, that the question of the probate of the will should be decided before trial. An injunction is prayed for until the further order of the Court.

The bill is demurred to.

The first question raised is whether the delay on the part of the heirs of Kauakahi in bringing their suit in ejectment, and acquiescence in the possession of the plaintiff and their ancestor, should conclude the defendants of their right to recover the land by suit at law. Kauakahi died in 1867. The Statute of Limita-

tions has not yet run in the plaintiff's favor. To put the question more tersely: Should equity enjoin A. from asserting a legal title, not barred by the Statute of Limitations, against B. because of A.'s knowledge of and acquiescence in B.'s possession for eighteen years? I think not.

I am aware of the principle upon which equity acts in declining relief where the party has allowed his claim to become stale; but these are all equitable claims. The citations, Sec. 1520 of Story, Eq. Jur., and other citations in plaintiffs' brief, are all upon claims which were cognizable only in a Court of Equity. Here the defendants' right to recover possession of the land is a legal one. It can only be barred by the full running of the statutory period of twenty years.

On this ground the demurrer should be sustained.

But the bill alleges that the question, whether probate of the will of Kauakahi can be obtained, should be determined before the suit at law can be tried with safety to the defense. The bill asks that the suit be enjoined until the further order of the Court, presumably in order that probate may be obtained. The allegations of the bill are not very full on this point. But I think enough is presented to warrant me in holding the injunction until a reasonable time is afforded the plaintiffs to present the matter of the probate of the lost will of Kauakahi to a Court having jurisdiction, and secure its judgment upon it. On the face of the bill nothing appears why probate should not be granted.

For this purpose the injunction may stand until the first day of the October Term, 1885, of this Court. I will then hear a motion to dissolve. Costs divided.

S. B. Dole, for plaintiff.

Kinney & Peterson, for defendant.

Honolulu, June 23d, 1885.

THE KING *vs.* YEONG TING.

BEFORE JUDD, C.J. IN INTERMEDIARY COURT.

JULY, 1885.

“Pak Kap Pio,” a Chinese lottery, is a “game.”

DECISION OF JUDD, C.J.

This case comes from the Police Court of Honolulu by appeal.

The defendant, a Chinaman, was engaged, as manager thereof, in a proceeding called Pak Kap Pio, as translated, the “Dove Lottery,” which may be described as follows: A cloth is hung up on which are tacked eighty small squares of paper, on each of which is written a Chinese character. Tickets are sold, having corresponding characters upon them. The holder of the ticket marks off on his ticket ten of such characters as he thinks may win. The manager, when all the holders of the tickets have completed their marking, takes down the papers from the cloth and rolls each one up in a ball so that the character on it cannot be read, mixes them up in a pan, then puts them promiscuously in four bowls, twenty in a bowl. The holders of tickets select and withdraw one bowl and contents. Sixty characters then remain. The manager then selects one bowl, and its contents, twenty characters, are the winning numbers. These are tacked on to the cloth and again hung up, and holders of tickets having characters on them which they have marked off, corresponding to the characters exhibited on the cloth, are winners, according to the number of characters so marked off. To illustrate: In the cheapest class of these lotteries, the one cent game, if a man pays ten cents he is entitled to mark ten numbers.

If he marks 6 of the winning numbers he wins.....	\$ 1 50
If he marks 7 “ “ “ “	15 00
If he marks 8 “ “ “ “	75 00
If he marks 9 “ “ “ “	150 00
If he marks all or 10 “ “ “ “	300 00

A record is kept showing the number of tickets sold, to whom, and the amounts received.

It is urged by the defendant's counsel that this is a lottery, a device by which by a simple chance a man may win something, and that it is not within the "Gaming Act" of this country, although its evils may be within the evils sought to be prevented by the Act. If one takes a chance in a raffle or a lottery he plays no "game."

BY THE COURT.

The statute of this country on the subject of gaming is in these words: "Whoever by playing at cards or any other game wins or loses any sum of money or thing of value is guilty of gaming." It is remarkable that though this section of the law has been on the Statute Book, unamended, for over thirty-five years, it has never received judicial construction.

Bouvier defines gaming to be "a contract between two or more persons by which they agree to play by certain rules at cards, dice, or other contrivance, and that one shall be loser and the other the winner. There are games which depend altogether upon skill, others upon chance, and some others are of a mixed nature. Billiards are an example of the first, lottery of the second, and backgammon of the last."

Bishop in his Statutory Crimes, Sec. 857, says of games or gaming: "It is perilous to undertake to give an original definition of a word so elastic in its use, and of such uncertain meaning; yet the author will venture the following, as indicating the sense in which it is more commonly employed. A contest of chance, or of skill disconnected from the idea of useful production, wherein the party in whose favor the result appears is termed the winner, and the other party is termed the loser."

I have no difficulty in finding that the matter under discussion is a "game of chance." Our statute is silent as to whether the game, to be within the law, shall be one of skill, of chance, or of both skill and chance. Therefore it includes games of all these descriptions. But the mere playing of such games is not forbidden. It is when by playing such games one shall lose or

win money thereby that the statute calls it "gaming," and a punishable offense.

The winning and losing of money in the game described in the testimony is clearly established. The defendant, as I understand it, was the manager of the lottery, and the chances of his winning money were exceedingly great. It is proved that he did win money by this game. Did he, however, play at the game? He conducted the lottery and had an interest in its almost certain gains. But I do not think it is necessary to hold that he must be shown to have personally manipulated the apparatus or devices used, in order to hold him a player of this game. He must be shown to have participated in it so far as to have risked money or a thing of value upon the contingency of success or loss. Our statute does not particularize the games which are unlawful, as in some countries. I must believe that the Legislature did not enumerate the games then in vogue, in order that the law might be comprehensive enough to include every description of game, which, if played for money, the law condemns. Human ingenuity is constantly inventing new games and new names for old games. But under our sweeping law it is not necessary that there should be new legislation to meet each new invention. The test is whether the player wins or loses money thereat.

In the case of *Commonwealth vs. Wright*, 137 Mass., 250, the Court discusses the question whether the game popularly known as the policy or envelope game, is a lottery. The Court find it to be a lottery, and call it a "game" throughout the discussion, and that the "playing" of it was by a person choosing a number and playing for it, and the rest of the game was executed or played by the conductor of the lottery.

Our statute is, as I have said, peculiar, and allows great latitude in construction.

Gaming is not an offence recognized by the common law of England.

Having found that the matter in which the defendant was engaged, to wit, a Chinese Dove Lottery, is a game in which by

playing at it he won money, I find him guilty, and sentence him to pay a fine of \$100 and costs, and to be imprisoned at hard labor for ten days.

Attorney-General Neumann, for the Crown.

A. S. Hartwell & W. A. Whiting, for defendant.

Honolulu, July 11th, 1885.

J. M. KAPENA, Minister of Finance vs. EMMA
KALELEONALANI *et al.*

IN EQUITY. BEFORE JUDD, C.J.

JULY, 1885.

Defendants having been decreed to be owners of the premises known as "Honolulu Hale" as against the Commissioners of Crown Lands, the Minister of Finance now sues defendants to recover amount of a mortgage on said property, formerly paid by the Government under the belief that the property was Crown Lands.

Held, on demurrer, that the Commissioners of Crown Lands are not necessary parties defendant: that the devisee, not the personal representative, of a deceased owner is the proper person to be sued: and that the Public Treasury, having paid a mortgage on the property under the mistaken idea that it was Crown Land, has a lien on the premises to the extent of its value at the time the mortgage was released.

DECISION OF JUDD, C.J.

The following is a simplified statement of the essential allegations in the bill:

I. Certain premises on Merchant street, in Honolulu, known as "Honolulu Hale," as well as several other parcels of land described in the bill, were the property of Kamehameha IV. in his private capacity, and were not a part of the Royal Domain commonly known as Crown Lands, although they were erroneously understood and believed to be such and were so treated.

II. An Act of the Legislature passed January 3d, 1865, entitled "An Act to relieve the Royal Domain from encumbrances," etc., authorized the Minister of Finance to extinguish

such mortgages on the Crown Lands as might remain unsatisfied after the administrators of Kamehameha IV.'s estate had exhausted the estate belonging to their deceased intestate in his private capacity.

III. The property described in paragraph I was not sold by the administrators, because it was believed to be a part of the Royal Domain, and not the private estate of the deceased King.

IV. The premises above described as "Honolulu Hale," as well as certain Crown Lands, had been encumbered with a mortgage by His Majesty Kamehameha IV., through the intervention of Wm. Webster as trustee, and this mortgage, amounting to \$7732, was paid off by the Minister of Finance in pursuance of the said Act of the Legislature of January 3d, 1865, under the belief that all the private estate of Kamehameha IV. had been sold, and the Minister of Finance paid other mortgages and liens amounting in all to the sum of \$27,000, towards discharging the debts of Kamehameha IV.

V. The plaintiff is the Minister of Finance, and in behalf of the King and people of this Kingdom makes this demand, and asks for the relief prayed for. The defendant Emma is the widow and statutory heir of one-half of the estate which was of Kamehameha IV.

VI. The premises above described as "Honolulu Hale" were held by the Commissioners of Crown Lands as part of the Royal Domain from the time of the creation of their trust by law until the termination of a suit on the equity side of this Court, brought by defendants against the Commissioners of Crown Lands, by which the said premises were decreed to belong to the defendants.

The bill prays that the premises known as "Honolulu Hale" may be decreed to be chargeable with the amount of the mortgage paid off by the Minister of Finance, and that they be sold to satisfy the same, etc.

Both defendants demur. The questions raised are, first: Are the Commissioners of Crown Lands necessary parties to the bill either as plaintiffs or defendants.

I cannot see that the Commissioners of Crown Lands have now any right or interest in the premises sought to be charged with the payment made, or in the fund sought to be recovered by the Minister of Finance. Their claims have been considered and adjudicated by the Court, and they cannot be again heard.

If the Minister of Finance has paid from the Public Treasury a greater sum than he would if the land in question had been sold to extinguish the mortgage upon it, his right to recover this sum from the owners of the land is unaffected by the fact that the Commissioners of Crown Lands have had possession of the premises and collected its rents, for they are accountable for these rents not to the Minister of Finance, but to the defendants, the holders of the title. The diminution of the supposed extent of the Crown Lands by the decree above referred to in favor of defendants, is a matter not raised by the bill, and the enquiry as to who should be made good in consequence of the diminution, whether the Crown or the Public Treasury, is therefore not pertinent to the issues before me.

I do not think the bill is demurrable on account of the non-joinder of the Commissioners of Crown Lands.

The second question is: Should the executors of the will of the late R. Keelikolani be made parties instead of her heir and devisee.

It is elementary law that it is not necessary to make the personal representatives of a mortgagor parties to a bill for foreclosure of a mortgage upon real estate. See Story's Eq. Jur., Sec. 175. The learned author says this is not necessary even though the mortgage is primarily a debt chargeable upon the personal assets.

If the bill sought to charge the personalty of the deceased defendant with this claim or to recover from it any deficiency over and above the proceeds of her land, her personal representatives should be made parties, otherwise not. It was so held in *Leonard vs. Morris*, 9 Paige, 89. I think the heir and devisee, who holds the title to the real estate sought to be charged with a lien, is the proper party defendant. The case of *Campbell vs. Kamaioipili*, 3 Haw., 477, is in point.

The objection taken by defendants, that the administrator of Kamehameha IV. had no authority to sell the deceased King's lands in order to pay his debts, I do not think is tenable. The jurisdiction to order such sales when the personal estate is insufficient has been exercised by the Probate Courts of this Kingdom from the time of their creation, and a confirmatory statute was passed by the Legislature of 1876. The administrator did, as a matter of fact, sell many of the King's private lands in pursuance of the authority of the Probate Court.

I do not think that the fact that the law set apart one-fourth of the revenues of the Crown Lands to be devoted to the repayment of the advances made by the Treasury, affects this case.

Nor do I think the issues raised in this case are affected by the subsequent act of 1866, which discharged the Commissioners of Crown Lands from all liability to repay these advances. The law made the grant in relief an absolute gratuity, the object of the Legislature being to relieve the Royal Domain of the mortgages upon it, and thus benefit the reigning Sovereign by enhancing the revenues of the Crown Lands. I can see nothing in the acts indicating that their object was to benefit the heirs-at-law of Kamehameha IV. The reigning Sovereign, Kamehameha V., was not the deceased King Kamehameha IV.'s heir-at-law. The statutory heirs of Kamehameha IV. were his widow and his father.

The remaining question is whether the bill shows title to the plaintiff to relief in equity.

Is there a lien in equity in favor of the Public Treasury upon the premises in question by virtue of the Treasury having paid the mortgage upon it? Is the Minister of Finance subrogated to the rights of the mortgagee?

The decision of these questions involve the discussion of many points not easy of solution.

The duty was by the law cast upon the Minister of Finance in connection with the Commissioners, to negotiate for the redemption of the mortgages, and he was to issue the bonds and use them to "extinguish those mortgages which may remain

unsatisfied after the administrator of his late Majesty's estate has exhausted all the estate belonging to his late Majesty, in a private capacity, which the administrator may be legally entitled to use for the payment of the debts of the estate."

The bill alleges that the Minister of Finance, believing that all the private estate of Kamehameha IV. had been sold in accordance with the provisions of the law, issued \$27,000 of Government bonds and extinguished the mortgages, paying the amounts due to the several mortgagees.

Subrogation is defined by Sheldon to be "the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt. The substitute is put in all respects in the place of the party to whose rights he is subrogated."

"Subrogation is treated as the creature of equity and is so administered as to secure real and essential justice without regard to form, and is independent of any contractual relations between the parties to be affected by it. It is broad enough to include every instance in which one party pays a debt for which another is primarily answerable, and which in equity and good conscience should have been discharged by the latter; but it is not to be applied in favor of one who has officiously, and as a mere volunteer, paid the debt of another, for which neither he nor his property was answerable, and which he was under no obligation to pay; and it is not allowed where it works any injustice to the rights of others." Sheldon on Subr., Sec. 1.

Bispham says: "The principle is a general one, and will apply in every instance (except in the case of a mere stranger) where one man has paid a debt for which another is primarily liable." Bispham, Principles of Eq., Sec. 337.

Chancellor Kent, in the leading case in America, *Cheesebrough vs. Millard*, 1 Johns. Ch., 412, says: "It is a rule which is founded on natural justice, and is recognized in every cultivated system of jurisprudence."

The doctrine does not depend upon privity. It is not neces-

sary to show any privity of contract between the Minister of Finance and the mortgagee.

The debt has been paid and the mortgage discharged. But this is not fatal to the application of the doctrine: "although as between debtor and creditor, the debt may be extinguished, yet, as between the person who has paid the debt and the other parties, the debt is kept alive so far as may be necessary to preserve the securities." *Wall vs. Mason*, 102 Mass., 316. This case is an instructive one. A grantee of land, who, through neglect to record his deed, has had the land taken from him on an execution issued upon a judgment rendered against his grantor in an action on a debt secured by a mortgage of the grantor's other land, may maintain a bill in equity against his grantor and the judgment creditor, to be subrogated, to the extent of his loss by the levy, to all the rights of the latter under the mortgage, not required for the full satisfaction of the debt. It was claimed in the demurrer that the bill showed that the mortgage was extinguished and discharged by the levy, so that the judgment creditor had no rights to which the plaintiff could be subrogated or which could be assigned to the plaintiff; also, that the plaintiff omitted to record his deeds as required by law, through no fault of the defendants but through gross negligence, from the consequences of which he had no ground of relief in equity. Chapman, J., says: "The doctrine of subrogation is not founded in contract, either express or implied, but is resorted to for the sake of doing justice between the parties. In the present case, the plaintiff, by neglecting to record his deed, left his land exposed to be attached and taken on execution by the creditor of his grantor. It has been taken and set off by the defendant Thayer. The plaintiff has thus paid his grantor's debt which the grantor ought to have paid himself; and it is but just that he should have the benefit of the security which his grantor had previously given to the creditor for the debt." I will again refer to this case later on.

The mortgage upon the land in question should in equity and

good conscience have been paid by the administrator of the estate of Kamehameha IV. out of the proceeds of the land itself, for it was private land of the King. The Minister of Finance was not a mere volunteer, for it is to be presumed that he was requested to pay this mortgage by the administrator. He cannot be regarded as having made the payment officiously and without any color of obligation to do so. The act in question placed the obligation upon him to discharge the mortgages upon the Crown Lands. In attempting to do this he made the double mistake, first, of paying the mortgage before the administrator had exhausted the private lands of his intestate; and secondly, of paying a mortgage existing upon a private land of the King. But he nevertheless paid a debt which the administrator or the heirs-at-law of the King should have paid, and under the definitions above given of the doctrine of subrogation, he should have the benefit of the security given by the ancestor of the heirs-at-law to the mortgagee.

"Where the owner of premises conveyed to him subject to a mortgage, in ignorance of the lien thereon of a judgment against a former owner, subsequent to the mortgage, pays the mortgage and causes the same to be satisfied of record, he is entitled to have the same reinstated as a lien prior and paramount to the lien of the judgment." *Barnes vs. Mott*, 64 N. Y., 397. Here the Court say: "So much of the judgment as restores the mortgage upon the premises now owned by the plaintiff, paid off and satisfied by the devisees of Burr, the then owners, and reinstates the same as a lien upon the mortgaged premises prior and paramount to the lien of the judgment recovered by Orchard and assigned to the defendant, is clearly right. Upon payment of the mortgage by the then owners of the premises, they were entitled to all the rights of the mortgagee, and to an assignment of the mortgage; and having caused the same to be satisfied under circumstances authorizing an inference of a mistake of fact, equity will presume such mistake and give the party the benefit of the equitable doctrine of subrogation. To do this in this case is to prevent manifest injustice and hardship, and interferes with no superior intervening equities."

Here the payment was made in ignorance of the fact of a judgment lien.

In the case from 102 Mass., the payment was made (or rather the land was levied upon) because the grantee had, through ignorance of law, not recorded his deed.

In the case before us, the Minister of Finance was ignorant of the fact that the mortgaged premises was private land of the King. He acted under the mistaken belief that the land was Crown Land. Is this such a mistake as will entitle him to relief?

The general rule is that ignorance of law will not furnish an excuse for any person, either for a breach or for an omission of duty. 1 Story's Eq. Jur., 110. The presumption is that every person is acquainted with his own rights, provided he has had a reasonable opportunity to know them. Judge Story says, *Id.* Sec. 116: "That whatever exceptions there may be to this rule, they will be found to have something peculiar in their character and to involve other elements of decision." Judge Story, *Id.* 120, says: "The most general class of cases relied on as exceptions to the rule is that class where the party has acted under a misapprehension or ignorance of his title to the property respecting which some agreement has been made or conveyance executed. So far as ignorance in point of fact of any title in the party is an ingredient in any of these cases, they fall under a very different consideration." Numerous cases are given where equity relieves a person who had parted with a title of whose existence he was wholly ignorant. *Id.* Sections 123, 124, 125.

In 15 American Decisions, 162, the case of *Black vs. Ward*, from 27 Mich., 191, is commented upon and all the principal authorities are well reviewed. I excerpt the following: "The case of *Brigham vs. Brigham*, 1 Ves. Sen., 126, is an important case on this side. The plaintiff had purchased an estate which already belonged to him, under a mistake of law, and the Court ordered the defendant to refund the money, holding that there was a plain mistake, such as the Court was warranted to relieve against."

The Master of the Rolls, Sir John Leach, in a later case (*Cockerell vs. Cholmley*, 1 Younge and Coll., 418) said that "no man can be held by any act of his to confirm a title, unless he was fully aware at the time, not only of the facts upon which the defect of title depends, but of the consequences in point of law; and here there is no proof that the defendant at the time of the acts referred to was aware of the law on the subject." The annotator adds that he believes the true principle to be deduced from the cases pro and con, and one which strongly commends itself to our notions of right and justice, is that laid down by Lord Mansfield in *Bize vs. Dickason*, 1 T. R., 285, namely: That if a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he might, he cannot recover it back. But when money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back again.

The Connecticut cases are in accord with this view. In 19 Conn., 548, *Northrop vs. Graves*, the Chief Justice said: "We do not decide that money paid by a mere mistake in point of law can be recovered back, as if it had been paid by an infant, or by a *femme covert*, or by a person after the statute of limitation has barred the action, or when any other merely legal defense exists against a claim for the money so paid, and which might be honestly retained. But we mean distinctly to assert that where money is paid by one under a mistake of his rights and his duties, and which he was under no legal or moral obligation to pay, and which the recipient had no right, in good conscience, to retain, it may be recovered back in action of indebitatus assumpsit, whether such mistake be one of fact or of law; and this we insist may be done upon the principle of Christian morals and the common law." This principle was reaffirmed in *Stedwell vs. Anderson*, 31 Conn., 139.

I think it is clear from the above cases that where reasons exist in equity and good conscience why the relief should be granted, the fact that the mistake was one of law should not prevent the granting of the relief.

From 2 Pomeroy, Sec. 849, I take the following: "Courts have felt the imperative demands of justice and have aided the mistaken parties, although they have often assigned, as the reason for doing so, some inequitable conduct of the other party which they have inferred or assumed. The real reason for this judicial tendency is obvious, although it has not always been assigned. A private legal right, title, estate, interest, duty or liability is always a very complex conception. It necessarily depends so much upon conditions of fact, that it is difficult, if not impossible, to form a distinct notion of a legal right, interest or liability, separated from the facts in which it is involved and upon which it depends. Mistakes, therefore, of a person with respect to his own private rights and liabilities, may be properly regarded—as in great measure they really are—and may be dealt with, as mistakes of fact. Courts have constantly felt and acted upon this view, though not always avowedly. Lord Westbury openly declares that such misconceptions are truly mistakes of fact."

In the case before me the Minister thought that "Honolulu Hale" was Crown Land. The fair inference from the bill is that he did not know that it was not listed in the statutory schedule of the lands reserved by Kamehameha III. to his heirs and successors. He may have thought, as many have, that all the lands of which Kamehameha III. died seized were Crown Lands whether in the schedule or not.

I cannot hold that this was a mere mistake of law, with a full knowledge of the facts. It was not a naked mistake of fact unattended with any special circumstances, for it seems to me that the Minister may have reposed special confidence in the representations and peculiar knowledge of the administrator of Kamehameha IV.'s estate, who held the evidences of title that the premises in question was Crown Land. It is to be presumed that the administrator thought it was. Fraud or deception on his part is not to be presumed. It seems to me that it was a mutual mistake. In fact the error was common to all who participated in the transaction.

I think the Minister of Finance, representing the Public Treasury, is shown by the bill to have a lien upon the "Honolulu Hale" premises to the extent of the amount of its value at the time the mortgage was released.

The demurrer is overruled.

Attorney-General Neumann, for plaintiff.

A. S. Hartwell, for Mr. and Mrs. Bishop.

F. M. Hatch, for Queen Emma.

Honolulu, July 23d, 1885.

THE WAIANAE COMPANY *vs.* HAWAIIAN BELL
TELEPHONE COMPANY.

IN EQUITY. BEFORE JUDD, C.J.

AUGUST, 1885.

Equity may enforce, by injunction, the negative part of an agreement, although the affirmative part cannot be specifically enforced by decree.

Demurrer sustained, to bill for injunction, for lack of allegation of irreparable injury.

An agreement for use of telephones held to be a license without consideration, revocable by the Telephone Company: and injunction to prevent removal of telephones and the bringing of suits at law for use thereof, refused.

DECISION OF JUDD, C.J., ON DEMURRER.

This is a bill in equity for an injunction to restrain the defendant company from removing or stopping plaintiff's communication with and full service of a telephone, and from bringing actions at law for the plaintiff's use thereof. The bill alleges that on the 23d of March, 1883, the defendant corporation being desirous to establish a line of telephonic communication between its central office in Honolulu and the district of Waianae, applied to the plaintiff corporation to obtain its consent for establishing and extending such line over the plaintiff's

land in the said district, and assistance in money to defray the expenses thereof, and of men to assist in the labor thereof, and offered the plaintiff to place and keep two telephonic instruments upon the plaintiff's plantation at said Waianae, and to keep the same in communication with the defendant's system of telephones, and to make no charge for one of said instruments or for its use in connection with the defendant's telephonic system. The plaintiff accepted said offer and paid \$500 to defendants in consideration thereof and performed its part of the contract, and has ever since paid for one of the said instruments at \$10 a month, and no charge has been made for the use of the other instrument until recently and now. Defendant threatens to remove the one of said instruments heretofore furnished free of charge, and to stop plaintiff's communication therewith, unless plaintiff shall pay a monthly rental or sum for the use thereof, and rescinds the agreement by which one instrument was to be kept for plaintiff's use in connection with the telephonic system free of charge. The bill alleges that great inconvenience and harm would be caused by the removal of the instrument, and submits that the defendant should be restrained by injunction therefrom and from bringing actions or suits at law for the use hereafter.

The bill is demurred to generally for want of equity.

Mr. Hatch, for defendant: At the most, the defendant threatens to discontinue a voluntary service unless plaintiff pays \$10 a month for it. If there is a contract to this effect, plaintiff can be recompensed by an action at law for its breach. The bill alleges merely inconvenience and harm, not irreparable damage. Courts of Equity should not be appealed to to establish a legal contract. By the telephone paid for the plaintiff is in connection with the telephone system.

A. S. Hartwell and E. Preston for the plaintiff: Equity has jurisdiction in this case to avoid a multiplicity of suits, as in case of failure to pay the tax of \$10 per month, the defendant might bring an action every month. The defendant is a corporation with limited liability and unable to respond in

damages. Parties are compellable in equity to abide by their contracts. Kerr on Injunctions, Chap. 22; 3 Pomeroy's Eq. Jur., p. 444. The \$10 per month which plaintiff may be compelled to pay is not the only damage. Plaintiff has given the right to carry wires over its land and has paid \$500 to assist, and in consideration or by way of rent is to have one telephone free. The damage cannot be computed. Plaintiff has paid its money and defendant maintains its lines over plaintiff's land for its own benefit. Should plaintiff sue for breach of contract or wait until defendant's charter expires and sue for the lump sum? There should be a decree for specific performance and a perpetual injunction to restrain the breach.

BY THE COURT.

I have some difficulty in ascertaining the equitable principles upon which this bill can rest. The bill does not allege the pendency of a suit at law to determine the legal rights of the plaintiff. The injunction prayed for is not interlocutory and in aid of the legal right, having for its object the protection of property from irreparable damage pending the trial. The bill is not constructed upon this theory. The bill does not contain allegations showing that a multiplicity of suits is threatened or would result if the injunction is not granted.

But it seems that if the Telephone Company covenanted and agreed that the plaintiff should have the use of the instrument in question free of charge, it would be equivalent to a covenant not to remove the same.

Bispham in his Principles of Equity, Sec. 461, says: "The remedy by injunction to restrain the breach of negative covenants may be said to furnish the complement to relief by specific performance."

"An affirmative covenant is an agreement whereby a man undertakes that something shall be done, and upon the breach of such a covenant, and upon a proper case of equitable interference being made out, the remedy is by bill for specific performance. On the other hand, by a negative covenant, the covenantor promises that something shall not be done, and

therefore the relief appropriate to a breach of such a contract is an injunction."

"Injunctions to restrain the breach of negative covenants are issued when the contract and the threatened breach are clearly shown, and when the recovery of damages at law would furnish an inadequate redress. While the theory upon which this relief is based is that of preventing irreparable injury, yet the Court will not enter into nice discrimination as to the extent of the damage."

Kerr on Injunctions, p. 528, says: "There was until recently much doubt upon the authorities whether the Court would enforce by injunction the negative part of an agreement containing both affirmative and negative stipulations, unless the affirmative part of the agreement was of such a nature that it could be specifically enforced by decree."

The leading authority in favor of the power is *Lumley vs. Wagner*, 1 D. M. and G., 604, and Lord St. Leonards established the principle that the Court may enforce the negative part of an agreement by injunction, although the affirmative part is of such a nature that it cannot be specifically enforced by decree. Here the defendant agreed to sing at plaintiff's theatre and not to sing at any other theatre. The judge restrained her from singing at any other theatre than the plaintiff's, though he could not compel her to sing at plaintiff's theatre.

It seems to me that equity has jurisdiction to restrain the breach of the negative covenant not to remove the telephonic instrument.

But I think the bill is defective in the want of an allegation of irreparable injury, and in that the agreement or covenant not to remove the instrument is not clearly stated.

I will sustain the demurrer with leave to amend within ten days.

Honolulu, July 15, 1885.

DECISION OF JUDD, C.J., ON THE MERITS.

I refer to my opinion on the demurrer for a statement of the bill. The amendments there suggested were made and the respondent has answered.

After hearing the proofs presented and arguments of counsel, I think the bill should be dismissed.

There was a contract made in writing between the parties on the 23d August, 1882, as follows:

"The undersigned hereby agree to pay to the Hawaiian Bell Telephone Company the sums set opposite to our names, being proportion towards building a telephone line from Honolulu to different places mentioned below; also, to pay a rental of \$10 per month for the use of instruments which the Hawaiian Bell Telephone Company guarantees to keep in order, and will enable us to communicate at any time with anybody connected with the central system of the Hawaiian Bell Telephone Company.

Five hundred dollars, H. A. WIDEMANN, Waianae.

One hundred dollars, JAMES CAMPBELL, Honouliuli.

Two hundred dollars, M. P. ROBINSON, Waimano and Hoaeae.

Fifty dollars, H. E. WHITNEY & C. H. JUDD.

Seven hundred dollars, HAWAIIAN GOVERNMENT, per J. E. Bush, Minister of Interior, three stations, Ewa, Waianae and Waialua.

Two hundred dollars, J. I. DOWSETT, Stations Moanalua and Mikilua.

One hundred dollars, J. P. MENDONCA, Mokuleia Plains."

By this the "subscribers" engaged to pay a rental of \$10 per month for use of instruments. This must mean for each station—for where more than one station is contemplated they are specified. The subscription of \$500 by the Waianae Company was announced by Mr. Widemann, its president, at a meeting of the stockholders of the defendant corporation before it was voted to put up the Waianae and Waialua line. It was paid on May 23d, 1883. The construction of the line was begun in January, 1883, and finished in June. Messrs. C. O. Berger and H. A. Widemann, the only witnesses for plaintiff, say that

the arrangement or stipulation was that the Waianae Company should have two stations on the line, of which the one at the manager's house was to be rent free. But Mr. Berger says that this arrangement to have the use of one instrument free was made while the line was being constructed. It is therefore apparent that this concession was not a part of the original contract, as a proportional contribution to the expense of erecting the line, the Telephone Company to keep the instruments in order, and the subscribers to pay \$10 per month for their use. The privilege of one instrument free was obtained at least five months later, and I cannot consider that it was a part of the original consideration. I much doubt if the rules of evidence would allow a written contract to be thus enlarged by parol. Moreover, I think this contract contemplating a continuance of the service for years is within the statute of frauds. There has been no part performance of this particular ingredient of the contract with knowledge on the part of defendant.

I find no evidence that this concession of one instrument free was acquiesced in or ratified by the defendant corporation. At the time it was alleged to have been made, Mr. Widemann was president, and Mr. Berger secretary, of both the plaintiff and defendant corporations. This requires that in thus dealing with themselves the utmost good faith should be used and shown. There was nothing on the minutes of the Telephone Company or on its record of instruments to show that the telephone in use at the manager's house was not to be paid for. Reasonably soon after the fact was discovered that it was to be rent free, it was disavowed by the defendant corporation.

Without discussing the remaining points made, my conclusion is that the use of telephone at the manager's house by the Waianae Company, free of rent, was a license without consideration, and hence revocable, and therefore dismiss the bill.

A. S. Hartwell, for plaintiff.

F. M. Hatch, for defendant.

Honolulu, August 8th, 1885.

JONA. AUSTIN, Assignee in Bankruptcy of J. P. Amaral
vs. CHAS. MICHIELS.

TRESPASS. BEFORE MCCULLY, J.

JULY TERM, 1885.

An action for damages caused to the credit of a trader by the conversion of his goods by a creditor, whereby the trader was forced into bankruptcy, does not pass to the assignee.

DECISION OF MCCULLY, J.

The plaintiff brings action of trespass upon a declaration that the defendant with force and arms, etc., entered the bankrupt's premises and took and carried away all the stock of goods therein belonging to said bankrupt, and converted the same to his own use, whereby the business of said bankrupt was broken up and said bankrupt suffered great loss and damage, and was injured in his credit and good name, and was forced to go into bankruptcy to the damage of the estate of said bankrupt, etc.

Demurrer: That the cause of action does not pass to the assignee.

It is not doubtful that the assignee of a bankrupt may bring suit for the goods, or the value, of the bankrupt, wrongfully taken. Section 12 of the Bankruptcy Act of 1884, authorizes the assignee to bring suits for debts due the bankrupt, and also any suit which has for its object the recovery of any portion of the bankrupt's property. But assignees can take only such choses in action as are of an assignable nature. An action for assault or for seduction could not pass to executors or assigns, and we may say generally that no action of which the gist consists of injury to the feelings or in which injury or insult is an aggravation, can be assigned, voluntarily or by operation of law. The allegation here is of injury to the bankrupt's credit, whereby he was driven into bankruptcy.

In *Brewer vs. Dew*, 11 M. & W., 625, in an action of trespass brought by assignees in bankruptcy for seizing and taking the

bankrupt's goods under a false and unfounded claim of debt by which he was annoyed and prejudiced in his business, and believed by his customers to be insolvent, and certain lodgers left his house: Held not to pass to assignees in bankruptcy under the statute that all the personal estate and effects of the bankrupt vest absolutely in the assignees, and the act is construed beneficially for creditors. The test in this case was that under the declaration the jury might give vindictive damages beyond the actual injury to the property.

The assets pass to the assignees. They may bring action for goods taken away or injured. But the bankrupt's commercial credit is not among his assets, and the assignees cannot bring action for an injury to it. The complaint alleges a special damage for which only the person injured can bring action. *Clark vs. Calvert*, 8 Taunt., 742; *Howard vs. Crowther*, 8 M. & W., 601; *Spence vs. Rogers*, 11 M. & W., 191; and *Rogers vs. Spence*, 12 Clark & Fin., 700.

The demurrer is sustained.

The Plaintiff and F. M. Hatch, for plaintiff.

L. A. Thurston, for defendant.

Honolulu, August 22d, 1885.

T. NAKEU *vs.* J. W. HIWAULI.

COVENANT. BEFORE McCULLY, J.

DECEMBER, 1885.

A recital in a deed, informally drawn in Hawaiian, held to be a covenant of warranty, but only as to the title recited in the deed, and not as to other or better titles.

DECISION OF McCULLY, J.

The complainant claims damages, having been lawfully ousted from premises conveyed by deed recited below. The defendant demurs upon the ground that the deed contains no covenant of title in the premises and for quiet enjoyment.

The instrument is in the Hawaiian language. I translate it as follows:

Know all men by this instrument that we both (maua) Hiwauli (k.) and my wife Kaeha (w.), of Waianae, Island of Oahu, for as much as Hiki (k.) was the own brother of Maualani (w.) who was the own mother of Nalua (k.), who was my father (Hiwauli), and in consideration of \$239 received by us from Tryphena Nakeu (w.), the receipt of which is acknowledged by this instrument. We have therefore given to be your own (a lilo loa) by sale or purchase, and convey and release altogether (loa) our right or portion (kuleana) in the lot of land awarded to Hiki (k.) by Royal Patent No. 2081, based on kuleana award No. 1979, situated at Kapalama, Kona, Island of Oahu, and conveyance is made of our interest in the said above land of any and every kind, all the rights and appurtenances thereof, to Tryphena Nakeu (w.) and her heirs, successors and assigns forever.

And we both bind ourselves, our heirs, successors and assigns, with a covenant of truth to execute truly (hooko pono, *i.e.*, truly carry out) all things written in this instrument.

In witness whereof, etc., etc., etc.

It seems to me that the latter clause of the deed is a covenant. The Hawaiian phraseology is sufficiently an equivalent of the terms commonly used to express a covenant in the English. But "any words in a deed in whatsoever part found from which the intent of the parties to enter into an engagement can be collected are sufficient for that purpose." *Newcomb vs. Preshey*, 8th Met., 410. It is a covenant to execute, warrant and defend what is previously expressed in the deed. And that I take to be that the genealogy set forth in the deed is correct, *viz.*, that the grantor is the grandson of the sister of the patentee, and that he conveys to the grantor such an interest as by that recital of relationship he may have in the estate of the patentee. What does that recital import? It does not import or covenant that the patentee left no issue or widow, or that Maualani, the grandmother, was the only brother or sister to take collaterally, or

that Nalua, her son, was sole heir to her, or that the grantor is the sole heir of his father, or that all of these parties are deceased or are intestate. The complaint sets forth that the plaintiff has been ousted by one Kale Aihonua, lawfully claiming by an older and better title.

There may be better titles in perfect consistency with what the grantor has set out in his deed and covenanted to be true. It is not alleged in the complaint that the recitals of the deed are not true. In my view that is all which the grantor covenanted to maintain. If he took nothing thereby his grantee cannot hold him for breach of contract.

The demurrer is sustained and complaint dismissed.

W. R. Castle, for plaintiffs.

Kinney & Peterson, for defendant.

Honolulu, December 16th, 1885.

A. J. CARTWRIGHT *et al.*, Assignees, *vs.* BISHOP & CO.

TROVER. BEFORE PRESTON, J.

FEBRUARY, 1886.

Although a transfer of all a trader's property may in most instances be treated as an act of bankruptcy, yet the assignees, by admitting proof of claim and paying a dividend on balance of the debt secured by the mortgage now sought to be attacked, are precluded from contesting the validity of the mortgage.

DECISION OF PRESTON, J.

This is an action of trover by the plaintiffs, as assignees of S. J. Levey & Co., bankrupts, against Bishop & Co., bankers, of Honolulu, to recover certain stock-in-trade, goods, chattels and effects, comprised in a certain chattel mortgage given by S. J. Levey to the defendants, to secure the sum of \$5000 and interest.

The case was heard before me, sitting without a jury, on the 4th of last January, when it appeared from the testimony that

on the 13th day of September, 1884, the bankrupt, S. J. Levey, then carrying on business in Honolulu under the style of "S. J. Levey & Co.," executed a mortgage in favor of the defendants for the sum of \$5000, then lent and advanced by the defendants to Levey.

The security purported to assign "all groceries, provisions, fixtures, implements, utensils, machinery, wagons, horses, and all other property of every kind belonging to me and used in connection with the grocery and provision business carried on by me at the Excelsior Lodge premises, on Fort street, under the style of 'S. J. Levey & Co.,' including the entire stock of trade in the said business, both the stock now at the said premises, and additions to the same now ordered or on the way from any place to the said premises."

The mortgage contained a power on the happening of certain events mentioned, some of which did happen, to take possession "of the said goods and chattels, together with all other new stock-in-trade, which may be at any future time substituted for such parts of the said goods and chattels as may be sold and disposed of from time to time in the regular course of trade of the said grocery business," and sell the same at public auction.

The money advanced by the defendants was used by Levey in extending his business.

The defendants, under the terms of their security, took possession of the bankrupt's store on the 11th September last, and removed a portion of the goods therein, and afterwards sold the same at auction, realizing \$2328.85 net.

On the 15th of September, 1885, the firm of S. J. Levey & Co. were adjudged bankrupt on their own petition, and the plaintiffs were duly appointed assignees.

It also appeared from the testimony that the defendants only removed and sold goods which were the property of Levey at the date of the security, and that they left the after acquired goods which were afterwards sold by the assignees.

It was also proved that the defendants had proved their debt in the bankruptcy, allowing credit for the amount realized on

the sale, and that the plaintiffs had paid them a dividend on the balance.

On this showing it was contended on behalf of the plaintiffs: That the security was void, inasmuch that it did not contain a specific inventory of the goods; that it professed to assign goods not then the property of the mortgagor; that the execution of it was an act of bankruptcy, as it purported to transfer the whole of the trader's stock-in-trade; and that the defendants at the time the security was given had reasonable cause to believe the mortgagor was insolvent.

It is not necessary in this case to decide whether a mortgage intended to cover after acquired property is valid, because the defendants did not exercise the power given to them. And I do not think that the contention of the plaintiffs, that the want of a definite description of the property invalidates the security, is tenable, because the property is identified and was taken into the defendants' possession before the bankruptcy. And although it is true that a transfer of all a trader's property may in most instances be treated as an act of bankruptcy, still I do not think the question arises in this case, as I am of opinion that by admitting the defendants' proof and by paying them a dividend on the balance of their mortgage debt, they are precluded from contesting the validity of the mortgage.

I therefore consider that the defendants are entitled to a decision in their favor, and give judgment accordingly.

Cecil Brown, for plaintiffs.

F. M. Hatch, for defendants.

February 2d, 1886.

A. J. CARTWRIGHT *et al.*, Assignees, *vs.* A. HOFFNUNG *et al.*

ASSUMPSIT. BEFORE PRESTON, J.

FEBRUARY, 1886.

A transfer of property by an insolvent trader, to a creditor who had reason to believe the insolvency, held to be in fraud of creditors under our statute, and set aside.

DECISION OF PRESTON, J.

This is an action of assumpsit for goods sold and delivered, brought by the plaintiffs as assignees of S. J. Levey & Co., bankrupts, against the defendants Cecil Brown, R. McKibbin and Marie Unna, executors and executrix of A. Unna, deceased.

On the 19th December, defendants applied to me in Chambers, under the law relating to interpleader, for an order restraining the claimants, A. Hoffnung & Co., from proceeding against the defendants for the recovery of the amount claimed in this action.

The claimants (A. Hoffnung & Co.) appeared by counsel, who stated their claim to be an assignment of this debt with others made by the bankrupts on the 10th day of July.

On behalf of the plaintiffs it was contended that the assignment was void against them, the bankrupts at the date of the assignment being insolvent to the knowledge of the claimants.

I made the restraining order asked for, and also ordered the defendants to pay the amount claimed (\$258.90) into Court, subject to further order, and directed the following issue to be tried:

Is the transfer of the debt of \$258.90 from S. J. Levey & Co., of the 10th day of July, 1885, to the said A. Hoffnung & Co., valid against the plaintiffs as assignees in bankruptcy of S. J. Levey & Co.?

The case was set down for trial at the last January Term, and the parties having waived a jury, it was heard before me on the 26th day of January last.

On behalf of the plaintiffs the following testimony was introduced:—

Alex. J. Cartwright: Had claims against S. J. Levey & Co. prior to 10th of July, 1885; I had claims due and overdue for self and clients amounting to \$14,000 or \$15,000; they were not paid as they became due; I know A. Hoffnung; can't call to mind date when he was in Honolulu; I have understood he was brother-in-law to S. J. Levey; I have paid dividends on claims amounting to \$38,223.21, paid fifteen per cent, may realize three per cent more; the stock realized a little over \$3000, other assets were book debts.

Cross-examined: I did not believe they were bankrupt two or three weeks before; I was very much surprised when I heard it.

J. H. Fisher: I am clerk in Bank of Bishop & Co.; I keep some of the interest accounts of the firm; did so prior to 10th of July last year; Levey's interest account was not in my particular department; from books I think they were indebted, interest overdue, can't say how long; part was overdue since 13th March, \$250 I think, interest due on notes.

F. L. Winter: Was book-keeper for Dillingham & Co., afterwards Pacific Hardware Co.; Levey was indebted to Pacific Hardware Co. and to Dillingham, prior to the 10th of July, about \$950; had asked for payment quite often, put off from time to time; had not been paid up to date of bankruptcy.

Cross-examined: Part of debt was due Pacific Hardware Co., part to Dillingham & Co.

T. J. King, Manager of Union Feed Co.: S. J. Levey & Co. were indebted to Company previous to the 10th of July something over \$1000; rendered bill a great many times; not paid at time of bankruptcy; portion paid since.

The plaintiffs closed their case.

On the part of the claimant the following evidence was given:

S. J. Levey: I know paper produced (assignment in question); this is my signature; I contracted debt with Hoffnung & Co.; first time Hoffnung was here he asked me for an order, said would give order for \$700 to \$1000; he remarked a small

order to send such a long distance, said if I gave a larger order he would give me a sufficient time to pay it in; on the strength of that I gave an order for \$6000; some time after I received goods, I remitted \$500; he drew on me, telling me to accept drafts, and if I had paid anything he would place it to my credit; he drew on me some time in May or June, 1884; I accepted, paid first draft, refused payment of second draft; I wrote telling him I did not wish to push myself; he came here and asked me for money; paid him on account twice I think; told me before he went away would like me to make a settlement on as easy terms as I could manage; day before, or might be day after, came to settle up; we made a settlement; he asked me if I had any money; said I had about \$150 in drawer; said I won't take that; gave him notes for \$200 each, fifteen I think; I spoke to him about book accounts, one or two perfectly good to collect any time; I did not want to press good customers; I did not lead him to believe I was insolvent; he asked me how business was; he said I ought to do a cash business; never told him what business was; never told him I was shaky; never told him I was in straits.

Cross-examined: Hoffnung is my brother-in-law; the drafts were \$1250 each; I paid \$500; he drew on me for full amount, four drafts; Bishop & Co. held drafts, I think at one, two, three and four months; I refused to pay because on due consideration I thought I ought not, because he had given me my own time; when the draft was presented can't say what debts were; believed I could pay them; paid him \$300 or \$400; last payment draft for £36; Hoffnung did not, I think, write for money; said he was coming out and would settle then; I wrote after draft was dishonored; received no goods after that; am not positive as to number of notes, I think fifteen; I did not know I was insolvent; I had not paid debts overdue; owed money to Cartwright; owed Mrs. Coney note, overdue, it was renewed every year; had a mortgage over stock-in-trade at time of the assignment; two mortgages, one to Bishop & Co., one to Macfarlane; I think \$5000 to Bishop & Co., and \$10,000 to

Macfarlane; interest was overdue, asked him to wait; Cartwright's note overdue, balance due on it; \$150 was all I had in store; lot of accounts due to me; last time took stock, July, 1884; book-keeper made up accounts and approximated stock before bankruptcy, some time in September; I did not lose money or contract heavy indebtedness between assignment and bankruptcy; had a heavy stock and accounts; paid heavy accounts for interest; approximated stock at \$12,000; could have found out position in July if I had looked at books.

Re-examined: Mortgage to Macfarlane was for his interest and goodwill; was not recorded; \$5000 to Bishop for money lent; Cartwright did not press; paid him \$600; asked Macfarlane to wait for interest to bank; have paid Cartwright money since then, fifteen notes for \$200 each; have paid one since July; agreed account with Hoffnung at \$3000; at time I ordered goods he said I might have five or six years.

S. M. Damon proved payment of first note for \$200.

Mr. Bickerton, for defendants, contended that "A creditor who can secure sufficiency according to law to satisfy his claim, is entitled to hold it against other creditors. This right, moreover, is not affected by the debtor's insolvency, or the preferred creditor's knowledge of such insolvency." Bump on Fraudulent Conveyances, 182, and other parts of the same work and authorities therein referred in support of this contention.

Counsel also contended that the burden of proof as to the fraudulent character of the transaction was in the plaintiffs, and that the transaction sought to be impeached was not within the bankruptcy law.

Mr. Avery, for plaintiffs, relied on Section 14 of the Bankruptcy Act of last session (1884), which section reads as follows:

"Every assignment, conveyance or transfer of his (the bankrupt's) property made by him after he shall have become insolvent, or committed an act of bankruptcy, except upon a good consideration to a *bona fide* purchaser having no reasonable cause to believe him to be insolvent or bankrupt, or in contem-

plation of insolvency or bankruptcy, shall be void, and the property so transferred may be recovered and disposed of by the assignees for the benefit of the creditors."

Before arriving at a conclusion in this case, I have to consider whether on the evidence I can find that the bankrupts were insolvent, or had committed an act of bankruptcy on the 10th day of July, 1885, the date of the assignment to the claimant.

I quite agree with the learned counsel for the claimant as to the right of a debtor to prefer one creditor to the others, and that such preference would be good against his other creditors, and for which position he cites the authorities mentioned; but I cannot agree that such a preference would be good where, as in this case, it is declared void by statute, under the circumstances mentioned in that statute, and it will be seen on a very cursory view of the sections quoted from Mr. Bump's work, that he qualifies his statements of the law by excepting cases controlled by statute.

On the date of the assignment impeached, Mr. Hoffnung held three dishonored drafts of Levey & Co., and he had been in Honolulu about two months, during which time the bankrupts had paid him a few small sums on account, and on the day the settlement was made, all the available cash they had was \$150. There was a registered mortgage for \$5000 over their stock-in-trade, and one for \$10,000 unregistered. At that time the bankrupts owed about \$40,000, and it is admitted by Levey that if he had examined his books in July he could have ascertained his position. On the 15th September the firm were adjudged bankrupt on their own petition, and it appears the assets will not realize one-fifth of their debts.

It is in evidence that they had previously dishonored their acceptances and notes, and that interest on their securities was overdue and unpaid; also that they had been unable and neglected to pay debts due to Dillingham & Co., The Pacific Hardware Company, and the Union Feed Company.

I am therefore of opinion, and do find, that the bankrupts were, on the 10th day of July last, insolvent, and that they had committed acts of bankruptcy previous to that date.

I am also of opinion, and do therefore also find, that A. Hoffnung had, at the time he took the assignment sought to be impeached, notice that the bankrupts had committed a prior act of bankruptcy, and that he had reasonable cause to believe that the firm of S. J. Levey & Co. were then insolvent.

I accordingly find and adjudge that the transfer of the debt of \$258.90 is invalid and void against the plaintiffs, and direct judgment to be entered accordingly.

The amount now in Court must be paid to the plaintiffs, and the costs of this action I direct to be paid by the claimants.

Castle & Avery, for plaintiffs.

R. F. Bickerton, for claimants.

February 2d, 1886.

ESTATE OF A. UNNA.

IN PROBATE. BEFORE JUDD, C.J.

APRIL, 1886.

Partnership debts are joint and several: a creditor may proceed against the estate of a deceased partner, whether the surviving partners be solvent or insolvent.

The discharge of executors of a deceased partner postponed until after the partnership has been wound up.

DECISION OF JUDD, C.J.

The executors and executrix have presented their accounts which show a balance of cash on hand of \$4175.64. This was derived from certain insurance policies on the life of the decedent, and they are devised to the widow in the will.

Messrs. M. S. Grinbaum & Co., who are the agents and large creditors of the Hana Plantation, a controlling interest in which as partner the decedent owned, move the Court that this balance be paid over to the receiver of the plantation.

This is resisted by the executors on the ground that M. S. Grinbaum & Co. have not filed their claims against estate of

decedent with the executors within the statutory period of six months and as this claim is against the plantation, which was partnership property, this must be exhausted before the creditors can call upon the individual estate of the decedent for payment.

Counsel for M. S. Grinbaum & Co. contend that the estate of the decedent was partly private estate and partly an interest in the partnership, and the will instructs the executors to continue the partnership business until July, 1887.

On a bill in equity to wind up the partnership by a surviving partner, Oscar Unna, in which proceeding the executors were parties defendant, a receiver was appointed on the 8th of August, 1885, before the six months' notice of the executors to creditors had expired, and in the order appointing a receiver, he was instructed to marshal the assets of the partnership and of the individual property, and the partnership assets of the decedent were ordered to be delivered by the executors to the receiver. The order allowed a certain sum to be paid monthly to the widow, for her support, out of the partnership property (the plantation) and the whole proceeding contemplated a settlement by the two estates together.

BY THE COURT.

I think the proceeding in equity for the appointment of the receiver gave ample notice to the executors of the existence of the claims of M. S. Grinbaum & Co. These are stated in the will and admitted by the answer of the executors.

The rule used to be that on the death of a partner joint debts were to be satisfied out of the joint estate; but if that was insufficient, then, subject to the claims of their separate creditors, out of their separate estates proportionally; and if any of them were insolvent, then out of the remaining estates proportionally.

But, says Collyer on Partnership, Sec. 580: "It is now established beyond controversy that in the consideration of Courts of Equity a partnership debt is several as well as joint, and that upon the death of a partner, the joint creditor has a

right in equity to proceed immediately against the representative of a deceased partner for payment of his separate estate, without reference to the question whether the joint estate is solvent or insolvent, or to the state of the accounts amongst the partners."

Story on Partnership, Sec. 362, is to the same effect. "It is now held that in equity all partnership debts are to be deemed joint and several; and consequently the joint creditors have in all cases a right to proceed at law against the survivors and an election also to proceed in equity against the estate of the deceased partner, whether the survivor be insolvent or bankrupt or not. The consequence is that the joint creditors need not now wait until the partnership affairs are wound up, and a final adjustment thereof is made. But they may at once proceed, as upon a joint and several contract, in equity, against the estate of the deceased partner." See 3 Kent's Com. 63.

I think the right of M. S. Grinbaum & Co. to proceed against the executors for their debt is clear. But this is not the proceeding before me, which is the mere settling of the executors' accounts.

But I think M. S. Grinbaum & Co. have a right to ask that the executors be not discharged and no distribution of the individual assets be made until the receiver has wound up the partnership. On the winding up, the receiver will have to take an account of what has been advanced to the widow from the partnership assets. This may not be for some time yet, and the fund may not be required.

I order that the executors' account be approved and that they invest the balance of money, as by their account, in some safe security, to be approved by the Court, to be subject to the further order of the Court.

S. B. Dole, for M. S. Grinbaum & Co.

W. F. Allen, Receiver, *per se*.

C. Brown, for self and co-executors.

Honolulu, April 22, 1886.

J. ROBELLO vs. F. GERARD.
COVENANT. BEFORE MCCULLY, J.
APRIL TERM, 1886.

Covenant of warranty in a deed held to be a warranty only of the grantor's title and not of a perfect title.

DECISION OF MCCULLY, J.

Action for damages on covenants in a deed.

The defendant demurs.

The portions of the deed involved in this controversy are the following: The defendant grantor bargained and sold "and by these presents do grant and convey unto the party of the second part, his assigns, etc., one blacksmith's shop situated on the Ahupuaa of Waiohinu, district of Kau, Island of Hawaii, and all my right, title and interest to the *komokino* right for the said blacksmith shop on the Ahupuaa of Waiohinu, to have and to hold the same, etc.

"And I do [for] myself, my heirs, etc., covenant and agree to and with the said party of the second part, his etc., to warrant and defend the sale of the said property hereby made," etc.

The complainant avers that a party, "which at the time of the said sale to the plaintiff and thence hitherto claimed to have and had lawful right and title to the said property and to the possession thereof," evicted the plaintiff.

The defendant submits on demurrer whether the covenants in the deed govern the grantor's *komokino* right or whether they are qualified by and limited to the words "right, title and interest." Did the grantor covenant to maintain a perfect right and title or the right and title which he had?

Some cases stating the law governing this matter are the following: *Sweet vs. Brown* 12 Met., 175. "The warranty is of the premises which were granted and conveyed by the deed. But that was 'all my right title and interest in and to that parcel of real estate, situate,' etc. It was not a grant of certain land in general terms, but of his title and interest in such lands,

and this particularly and fully expressed." *Allen vs. Holton*, 20 Pick., 458; *Blanchard vs. Brooks*, 12 Pick., 47, 66; *Ballard vs. Child*, 46 Me., 152.

The covenants in a deed are restricted to the grant, and if the grantor conveys only his own right and title in the premises he is not liable upon his covenants of warranty even against persons claiming under his own previous conveyances. In *Hubbard vs. Althorp*, 3 Cush., 419, the Court, referring to some of the above cited cases, say "it is unnecessary to consider particularly the effect of a covenant of warranty in a deed, when the only thing described in the premises is the right, title and interest of the grantors."

It seems to me that no other principle could be supported by reason or authority.

It was held in this Court by a single Justice and not appealed to the Court in Banco, in *Nakeu vs. Hiwauli*, ante, page 596, that the warranty extended only to the matter set forth in the grant, which was that the grantor sustained a certain relationship to the deceased patentee, and covenanted for that right, whatever it might be. It is to be observed that the deed contains no covenant of seizin of anything, and it contains no description by metes and bounds of any premises. Only the words "my right, title and interest to the *komokino* right for the said blacksmith's shop," are given to define any supposed right to the site of the shop. This is simply unintelligible. A covenant must covenant something having a precise and legal meaning. The conveyance or bill of sale of one blacksmith shop is not, I think, qualified by the words, "right, title and interest," and the warrant is to defend the sale of that property. The plaintiff's declaration I hold to be good for that and nothing more.

He may amend on payment of all costs to the present time, otherwise the whole demurrer is sustained and the complaint dismissed.

S. B. Dole, for plaintiff.

Kinney & Peterson, for defendant.

Honolulu, April 27th, 1886.

JONA. AUSTIN, Assignee in Bankruptcy of J. P. Amaral
vs. CHAS. MICHIELS.

TROVER. BEFORE PRESTON, J.

JUNE, 1886.

A creditor took possession of a trader's stock under an agreement: held, the creditor was liable to the trader's assignee in bankruptcy for all goods bought by the bankrupt from outside parties: and the value of the goods at date of conversion, as per an inventory taken at that time, less expenses of auction sale, held to be the measure of damages.

DECISION OF PRESTON, J.

This is an action of trover for certain dry goods, groceries and provisions, being the stock-in-trade of said bankrupt Jose P. Amaral, alleged to have been converted by the defendant to his own use.

The defendant, under an agreement in writing with the bankrupt, furnished the latter with certain dry goods and merchandise for sale at Hilo, and the bankrupt was to pay the daily receipts and furnish weekly accounts to the agent of the defendant.

The defendant was to be allowed ten per cent upon all groceries and other goods purchased by the bankrupt with the knowledge of the defendant.

The agreement contains other provisions as to insurance, etc., which it is not necessary further to allude to.

Power was given to the defendant, upon failure by the bankrupt to fulfil any of the conditions, to confiscate all the goods of the bankrupt "without going to Court, and without the help of any lawyer, collector or sheriff."

The defendant took out a retail license in his own name for the place where the business was carried on, but no name was exhibited at such place of business.

On the 22d of September, 1884, the defendant being dissatisfied with the conduct of the bankrupt, took possession of his

store and of the goods and effects therein, including, as it is admitted, some goods (groceries, etc.) which had not been supplied by the defendant, and were not his property.

The store remained closed for upwards of two months, and the goods were eventually sold at auction, by order of the defendant, by Mr. Hitchcock, on the 2d and 20th days of December, 1884.

Jose P. Amaral was adjudicated a bankrupt on the 2d day of December, 1884, and the plaintiff was appointed assignee, and the action is brought by him to recover the value of the goods in the store at the time of the defendant's entry.

Evidence was taken before me at various times during the vacation, upon the consideration of which and the documents referred to, I am of opinion that the plaintiff is entitled to recover in respect of the goods taken by the defendant which were purchased by the bankrupt from outside parties.

Counsel for the defendant contended that in the event of my so finding, the measure of damage should be the price realized at the auction sales.

On the other hand the plaintiff contends he is entitled to recover the actual value at the time of the conversion, on the 22d September.

I think the plaintiff's contention is correct.

From the testimony, and in the nature of things, the goods deteriorated during the time the store remained closed, being damaged by rats and otherwise.

The plaintiff being entitled to recover the value of the goods at the date of the conversion: How is that value to be ascertained?

The defendant, on taking possession, caused an inventory and valuation to be taken and made by Mr. Mabey, the manager of Mr. Cleghorn's store at Hilo; this inventory was filed by the defendant, and it is the only basis upon which I can calculate the value.

From this valuation it appears that the goods improperly taken by the defendant were valued at \$301.79.

I have not been furnished with the account sales of the auctioneer showing the expenses of the sales, and must therefore allow such amount as I think would be reasonable, and I allow ten per cent upon the said value, amounting to \$30.18.

I therefore am of opinion that the plaintiff is entitled to recover from the defendant the sum of two hundred and seventy-one dollars and sixty-one cents (\$271.61), and I give judgment for that sum with costs.

F. M. Hatch, and plaintiff in person.

L. A. Thurston and Ashford & Ashford, for defendant.

June 25th, 1886.

KEKAHA vs. ISAAC D. IAEA, *et al.*

IN EQUITY. BEFORE PRESTON, J.

JUNE, 1886.

A deed set aside for fraud of the grantee: it appearing that the grantor, an aged Hawaiian, was imposed upon, and induced to make an absolute conveyance under the belief that he was signing a trust-deed.

DECISION OF PRESTON, J.

The complainant, by his bill, alleges that on May 29th, 1885, he was possessed of certain real estate, situate at Makawao, on the Island of Maui, of the value of \$4000 and upwards; that he is sixty years and upwards of age, and that he is unable to read or write: that he has had fourteen children, all of whom are dead, leaving six grandchildren, of whom the female defendant is one: that for some months prior to said 29th of May defendants repeatedly urged complainant to make over all his property to them, in trust, for the use of complainant, in order to relieve him from the care and management of same, and kept working on the feelings and affections of the complainant in order to secure the same: that complainant ultimately consented thereto, and that the defendant, Isaac, thereupon had an

instrument drawn by one John W. Kalua, an attorney at law, residing at Wailuku, who took his instructions solely from said defendant, complainant not knowing what said instructions were: that on said 29th of May, said Isaac told complainant that said instrument was ready to be signed and requested him to go to Mr. Kalua's office and sign same, at the same time fraudulently and falsely leading complainant to believe that said instrument was one in accordance with their previous understanding, and conveying complainant's real estate to the said defendants in trust for the use of complainant: that complainant went to Mr. Kalua's office and signed said instrument, supposing same to be such as said defendant had led him to believe it was: that complainant never had possession of the instrument and knew nothing more of it, till he was informed by Mr. Everett, Sheriff of the Island of Maui, in the early part of this year, of the nature and effect thereof, and that he then ascertained that the same was a warranty deed of all his land to the defendants jointly and that no trust had been created in favor of complainant, and no reservations or exceptions whatever had been made in his behalf, nor any provision made for complainant's other grandchildren.

The complainant further says that there was no consideration whatever for said deed received by complainant, nor agreed upon, and that it was never his intention to execute any such instrument as the one in question, nor to convey said property to said defendants, other than for the purpose of enabling them to manage the same for complainant, he being old and feeble, nor had it ever been his intention to disinherit his other grandchildren. The bill further alleges, that the defendants had or they were about to mortgage or otherwise encumber the property, and prays a reconveyance of the property, and an injunction and general relief.

The answer denies that defendant urged the complainant to make the deed, or that the defendant, Isaac, ever gave to said Kalua any instructions, as to drawing any conveyance from the complainant to the respondents, or that said Isaac by any words

or acts led complainant to believe that any deed drawn by said Kalua was a deed in trust, or that said Isaac or his wife did or said any matter, thing or word in relation to said deed that could have been misleading to complainant in and about the same.

The answer admits the execution of the deed by complainant; and denies that complainant was informed that it was a deed of trust; and charges that complainant was well acquainted with the nature and contents of the said deed, and that the same was read over and explained to the complainant before the execution thereof; and avers that complainant received from the defendants \$300 as consideration money for the said land on the day said deed was executed as *said* deed recites; and that complainant executed the same understandingly; and that said deed was drawn at the instance and request of complainant, and in accordance with his repeated wishes; and that the defendants by reason of their care, kindness and attention to complainant should possess and enjoy said property.

The answer further alleges that the defendants have executed a mortgage of the said property to Mr. Cartwright to secure the sum of \$1000 lent to them, and that the same is still outstanding: that for some time previous to the execution of said deed the defendant Isaac had, under a full power of attorney from the complainant, managed and controlled his business, property and affairs, and that the defendants have, since the execution of the deed, until a short time previous to the filing of the bill, cared for, attended to, and supported complainant, and that the consideration in said deed recited was good and valuable.

The cause was heard by me on the 14th and 16th inst., and evidence was taken at some length, and upon such evidence I find that the complainant has failed to establish his allegations that the defendant, Keahi Pakamea, urged the complainant to execute the deed, or that she in fact took any active part in the transactions complained of.

The deed in question is an absolute conveyance from the complainant to the defendants, of parcels of land containing

between 500 and 600 acres, valued at \$5000, (part being let at \$300 per annum), for the alleged consideration of \$300 and natural love and affection. It was executed on the 29th of May, 1885, and the defendant, Isaac, left Wailuku the same night and arrived in Honolulu by steamer early on the morning of the 30th, and placed the deed on record at 9.30 A. M., and soon after negotiated a mortgage through Mr. Castle upon the property, for \$1000. The mortgage was executed on the 15th of June, but the money was not actually received by the defendant until about the 14th of July.

The material point to be considered is, what was the intention of the complainant when he executed the deed in question.

Kamehaikana, (k.) a witness called on behalf of the complainant, testifies, that some time last year he was present and heard the defendant, Isaac, ask the complainant to be his "Kahu malama waiwai," (agent or trustee) for his real and personal property, to which the complainant agreed. The defendant then said, "go down to Kalua's to acknowledge the paper;" the complainant replied, "I cannot go down to-day but I will go on some other day." The witness further testifies that afterwards having heard that the complainant had executed an absolute conveyance of the property, he spoke to the defendant, Isaac, about it, who put his hand to his mouth and said, "hamau," (hush, or be silent). The defendant absolutely and unqualifiedly denies these statements, and further says he never knew the witness until he saw him in Court, although he admits that he knew where the witness lived, about an eighth of a mile from the complainant.

John Richardson testifies that in the last part of December, last year, having heard from Mr. Everett something about the deed, and having been requested by him to make some enquiries respecting it, he spoke to the defendant, Isaac, and told him that the complainant was greatly put out when he heard that a deed had been executed instead of a trustee paper: that Isaac replied he did not know it was anything else, and added, that he was not present when the deed was executed, and said that

what was intended was a trustee deed from the complainant to himself, in trust for his "moopunas" (grandchildren), his wife being one of them, but when the deed was made out he saw that only one grandchild's name was in it, but supposed that the old man (complainant) had so instructed Kalua, and therefore thought no more of it. The witness further testifies, that he asked Isaac, "as the deed was not what the complainant intended, would he be willing to compromise;" and the defendant said "yes." On his return from Molokai the witness again saw the defendant who told witness he had compromised with complainant.

The defendant denies that he told Richardson that the contents of the deed were not as agreed.

The complainant testifies, "I remember signing a paper in Kalua's office; that's where the trouble came in; if Kalua had done what was right I would not be here to-day; the paper was made at Kalua's office; neither defendant, Isaac, nor his wife were there; I went to Kalua's office because Isaac told me to go and sign a trustee deed; Isaac had a power of attorney from me to take care of the cattle and other personal property; we divided the increase of the cattle, half to him and half to me. The difference between the first and second papers is, the first one is a power of attorney and is all right, the second one is not right. I understood I was to go to Kalua's from Waiehu and Isaac from Makawao, to execute another trustee paper; I first heard that the paper I signed at Kalua's was an absolute deed, from Mr. Everett, after he got a copy from Honolulu; I asked him to obtain a copy; Isaac and I never agreed that it was to be an absolute deed; there was \$100 in his hands; I asked, what's that for? he said he had mortgaged the land; I told him he had no right to mortgage; Isaac never told me that I was to sign a deed to him and his wife; he asked me three times to go to Kalua's; all those times he spoke of a trustee document only; he had charge of all my papers, patents and leases; one lease is for \$300 a year; he collected my rents; Isaac gave me the \$100 in my house at Waiehu; no money, at any time,

was paid me in Kalua's office; the deed mentions \$300; all I got was \$100; neither Pake (Waiwai) or Kalua ever read the deed to me; I was questioned only as to where I got the Royal Patents; I never told Kalua how to draw the deed; when the deed was all drawn up Kalua wrote my name and I made my cross; I put my cross on the paper because I thought it was good; Kalua never explained the paper to me; at the time I put my cross I thought I was executing a trustee paper for Isaac to hold in trust for all my grandchildren and they to take care of me, and when I die all the property was to them."

E. H. Bailey testifies: I know complainant's land at Makawao, said to be sold to Isaac; I consider that land worth \$5000 at least; on 14th July, 1885, had a talk with Isaac in reference to a piece of land I had sold to complainant; he had paid part of the purchase money; I went to complainant for the balance; he said Isaac would soon collect some rents and pay me; in July Isaac came and paid me the balance; he said he was a trustee and had to hooponopono Kekaha's waiwai (look after Kekaha's property); at that time I had not made out deed for the property; he then said, "make the deed to my wife;" I said I never got instructions to that effect from Kekaha; he said "that is the share of Kekaha's property that is going to my wife;" told him Kalua would make out deed and I would attend to it as soon as I could; a few days afterwards I saw complainant and told him I had received balance of money, and that Isaac told me "to make deed out to his wife;" complainant said "No, don't do any such thing, you make the deed to me;" I received from Isaac \$147.

Mr. Everett was also called as a witness for the complainant, but from the view I take of the case his evidence is not important.

The defendant was called as a witness for the complainant, and afterwards testified on his own behalf, and stated: I have borrowed \$1000 on land included in deed to me; I applied that money as follows: \$500 to Kekaha personally, the rest went to pay rents of leased lands, and also to Bailey for his land, some of

it I used myself; mortgage was made on 15th June, I saw Mr. Castle first week in June; deed had already been made which I brought down on 29th of May; some months before deed was made Kekaha and I had talked about mortgage and agreement made; I came down with the deed for the purpose of raising loan; power of attorney does not give me power to mortgage.

In answer to questions by the Court, he says: I gave to Kalua \$150 before the deed was made, and gave him \$150 more after the deed was executed, a few days after, before I came to Honolulu; I brought deed down to record; deed was executed on Friday, I think; I left Kahului by Maalaea way; I can read English; my answer was read to me; I understood it; the statement in my answer that we paid \$300 on the day the deed was executed is not correct; what I testified is true that the money was paid in two payments; I did not see Kalua pay Kekaha the money.

The defendant further testified as to alleged troubles between the complainant and his grandchildren, and says: Owing to all this trouble, complainant said to me "he would deed all his land to me and my wife, provided I was to take care of him and the rest of the family." One month after this suggestion I told him I was ready to have deed made as he wanted, so I went and saw Kalua; it must have been complainant who told Kalua to draw deed; in last week of May complainant asked me if deed was ready; I told him I would see Kalua; found deed was ready and informed complainant; on Friday at 2 P. M. I came down from Makawao, got deed which was executed, took it and showed it to him, told him to go to Kalua's and get money; I remember paying Bailey balance due him; I told him to make deed in my wife's name; when I found out deed was not made out only in wife's name, I meant to ask complainant, but this suit intervened.

This statement appears to be false on the face of it. The defendant knew when he mortgaged the property that the deed was made to himself and wife, and no question was raised by complainant for six months afterwards. The suit was commenced on the 4th May last.

The defendant says: I also intended to ask Kalua if Bailey had given him instructions to make deed in my wife's name, but I dropped it as I was accused of defrauding complainant; I did not tell Bailey that land was my wife's share; I did tell him that I had the management of complainant's property; it was the fault of the one who drew the deed that my name was put in with my wife's; perhaps complainant instructed; original understanding was it was to be in my wife's name only; I thought that the instrument would be drawn up in wife's name, not mine; no reservation of life interest was made for complainant; I was to get the rents immediately, that was the understanding. Complainant said: "I am going to give the property to you, you to look out for me and I look out for you;" Am sure I gave Kalua no instructions about making the deed; when I paid the \$500 to complainant his wife was present; I did not get release of dower because Kekaha's wife was deady opposed to the transaction between us; I told Kalua the consideration was \$300; I paid the complainant all in silver, \$500; paid Bailey his balance, \$150; I went to Paia with \$289.75, being balance left; I paid Everett \$50.25; debt of complainant to Edward Edwin, \$25; others I forget; have used the balance myself; I did not tell anybody about the \$500 I paid complainant; have collected rents twice since deed; the first \$150 I paid all to complainant; the next received \$150; paid complainant \$100, and kept rest myself.

J. W. Kalua identifies deed, and says: This deed was drawn by my clerk, Waiwairole; I gave him orders; Isaac gave me the instructions how to draw it; he told me to make a deed from complainant to himself and wife, consideration \$300, love and affection. The witness states that he read deed to complainant and explained it to him, and that he said he was satisfied; that he paid complainant \$150 two weeks before execution of deed; he had called to ask if deed was ready; "I did not know what deed he meant; he asked me if Isaac had left me any money. After execution of deed I paid Kekaha money; not positive how much, \$100 or \$50; gave all receipts to Isaac

(defendant admits this but says they are lost) ; week afterwards I paid balance of \$150; I delivered deed to Isaac on same day; he said he was going to Honolulu, then I asked Isaac for balance of purchase money; I think Waiwaihole was present when I paid balance of second \$150 to complainant; complainant never told me to insert Isaac's name to the deed; Isaac paid me the money in the morning of the day he went to Honolulu; am quite sure; he did not leave me \$150; can't remember how much, was busy; I paid complainant the balance after I received money from Castle out of my own money which I advanced Isaac; I did not know he was going to mortgage; did not tell me." The witness also stated that on settling with Isaac he deducted from the mortgage money the amount he paid complainant.

Waiwaihole confirms Kalua's testimony as to the deed being read to complainant, but says that he never saw complainant at the office afterwards, and did not see Kalua pay him any money.

On this testimony I am asked to dismiss this bill and thereby declare this transaction complained of valid. This I cannot do, as it appears to me that the defendant has perpetrated a gross and long premeditated fraud upon the complainant. The defendant is contradicted in so many important particulars, especially in the statement that he did not instruct Kalua to prepare the deed, that I am unable to give credit to any part of his testimony favorable to himself. The defendant was the confidential agent of the complainant, and appears to me to have wished to raise some money on this property, but finding the power of attorney he held insufficient for the purpose, devised this scheme to effect his purpose. This is one of the many cases which, unfortunately, come before this Court, where old and industrious Hawaiians are induced by their younger relatives to make away with property accumulated by industry, to enable such younger relations to live in idleness.

This defendant appears to think it very meritorious on his part that he and his wife, the complainant's grandchild, have

looked after and cared for the complainant, as they say, and that they are therefore entitled to deprive him of all his property in his lifetime, instead of considering that it is their duty (in which they ought to take a pride) to look after and comfort the complainant, and endeavor to make the remainder of the life of their grandparent as free from care and trouble as possible.

From the defendant's own showing I am of opinion that the deed executed by the complainant is not such an instrument as he intended to execute, and was led to believe by the defendant Isaac he had caused to be prepared, and although the deed was read over to him by Kalua, I do not think he understood the full effect of it. The statement of the defendant as to the disposition of the loan, if true, is inconsistent with the claim that the deed was intended to be absolute. He received, according to Kalua's testimony, \$940 or \$960. He says "he paid complainant \$500, Bailey \$150, Everett \$50.25, Edwin \$25, making together \$725.25, and others he forgets, and retained \$289.75 for himself:" this is evidently incorrect.

There is one part of the transaction that I wish to say a few words upon: Kalua says he has been acquainted with the complainant since 1869, and he has had business transactions with him, and he says nothing was said about releasing his wife's dower, nor did he enquire of the complainant if he were married; neither does it appear that any inquiry was made on behalf of the mortgagee as to this fact. Had these inquiries been made it is most probable that this fraud would have been detected at the outset.

Being of opinion that the complainant has been imposed upon, and that the deed has been fraudulently obtained by the defendant Isaac, I do find and declare the said deed to be fraudulent and void as against the complainant, and direct the same to be delivered up; and do further order that the defendants execute a deed, in a form to be approved, revesting the property in the complainant, subject to the mortgage, and that the defendant Isaac indemnify, in such a manner and form as may be approved by the Court, the complainant from the pay-

ment of the principal and interest money secured by the said mortgage; and also that he pay the costs of this suit.

Kinney & Peterson, solicitors for complainant.

W. R. Castle, for defendants.

June 28th, 1886.

LEE AH SUE *vs.* CHU KEE *et al.*

GARNISHMENT. BEFORE JUDD, C.J.

JULY, 1886.

Our garnishee law does not authorize the attachment of property in the hands of a third party in aid of a judgment: but only "debts" due by the garnishee to the principal defendant.

DECISION OF JUDD, C.J.

This is a statutory proceeding for process of garnishment in aid of an unsatisfied judgment. A judgment by plaintiff against defendants was obtained in the District Court of Ewa, on the 27th November, 1885, and transcript thereof docketed in the Supreme Court, and execution issued thereon for \$172.10 on the 30th November, 1885.

It is in evidence that Chu Kee, one of the defendants, had died about December, 1884, but his business as a watchmaker had been continued by his sons at a shop belonging to one Ahi, on Nuuanu street, Honolulu. In November, Ahi, through Ashford & Ashford, his attorneys, distrained the goods in the shop for rent. The goods were all removed to the auction rooms of E. P. Adams & Co., and sold, realizing over \$300. The amount of rent and expenses of distress, some \$90, was paid to Ashford & Ashford, for Ahi, and they claimed the custody of the balance of the money of Mr. Adams. Mr. Adams, however paid it over to Mr. W. R. Castle, who had on the 18th of November, 1885, received an assignment of the property of Ahung, doing business under the firm name of Chu Kee & Co., for the benefit of his creditors. Mr. Castle says he had claims

from San Francisco against Chu Kee, amounting to about \$1800, and on learning that the goods had been taken from the shop on Nuuanu street, claimed the proceeds of the auctioneer and obtained them.

Without here going into the question raised by the garnishee whether the judgment on which these proceedings are founded is void as having been obtained against a defendant who was then dead, and consequently no service of process was had, I am of opinion that the garnishee is not liable for the reason that the fund he holds is not a "debt owing to the judgment debtor." The statute, Secs. 5 to 9 of the Act of 1876, relating to the garnishee process, does not authorize the attachment of money or goods in the hands of a third party in aid of a judgment, but only "debts" owing. The money in Mr. Castle's hands is not in any sense a debt owing by him to Chu Kee (of the firm of Yee Sing Wai Company) or owing to Chu Kee in any capacity. This money is the proceeds of the merchandise of the watch-maker's business, either of Chu Kee, deceased, or of Ahung, who claims to have succeeded to the business of Chu Kee, whether regularly or irregularly I cannot say.

In either event I do not consider the garnishee liable, and order his discharge.

Ashford & Ashford, for plaintiffs.

H. E. Avery, for garnishee.

Honolulu, July 7th, 1886.

CHING ON *et al.* *vs.* AMANA *et al.*

EJECTMENT. BEFORE JUDD, C.J.

JULY TERM, 1886.

Judgment in ejectment may be rendered severally against defendants, for the portion of land held by each, notwithstanding that they were sued jointly.

DECISION OF JUDD, C.J.

This is an action of ejectment for the possession of two tracts of land situated at Waimalu, Ewa, Oahu, embraced in Royal Patent No. 4472, to one Kamanaoulani, containing 42.65 acres.

To the complaint Hopai Yet pleaded the general issue. Amana was defaulted; but, by consent, default was taken off, and he answered during the trial, disclaiming as to the portion of the premises in possession of Hopai Yet; and as to the rest of the land he pleaded the general issue.

The point is made that the defendants having been sued jointly, judgment cannot be rendered against them separately, and so the judgment should be of non-suit.

This is an interesting question of practice. It cannot well be decided without reference to the facts of the case. I find from the evidence that the patentee of the land died about the year 1856, leaving two daughters, Napuahola and Nahauhau, as his sole heirs-at-law.

The younger, Nahauhau, died soon after this, unmarried and childless. Napuahola married one Joseph Manuel, and bore a number of children to him, but they all died but one, Mary, the plaintiff. Napuahola died in 1866, and her heir-at-law is the plaintiff, Mary.

It seems that on the 30th July, 1877, Joseph Manuel sold this land to Amana, defendant, and Asee and Apo. The interest of Asee and Apo have by successive conveyances become vested in the defendant, Hopai Yet.

The deed of Joseph Manuel conveyed nothing, except his

curtesy, as father of the child, Mary, for the title was in Mary by inheritance from her mother, Napuahola. Lately the two defendants, Amana and Hopai Yet, have divided both pieces of land between themselves by deeds of partition. Whatever claim they have to the land is from the same source, the deed of Joseph Manuel. Under the authorities, I think, the plaintiff can recover judgment against the defendants severally, for the portions of the estate held by them, although they were sued jointly.

In *Jackson vs. Woods*, 5 Johns., 278, Chancellor Kent so held. He says: "To dismiss the plaintiff, and turn him round to a separate ejectment against each defendant, would be nothing but vexation to all parties; it would be applying to torts the rule applicable only to contracts, that if you declare for a joint possession, you must show one." In *Fisher vs. Hepburn*, 48 N. Y., 41, it is held that when there are different claimants, each claiming distinct parcels of the real estate in question, but all denying plaintiff's rights on the same ground, and claiming title from the same source, it is proper to join them in the same action.

In *Den vs. Snowhill*, 13 N. J., 23, it was decided, that when two or more persons, holding distinct and separate possessions of the premises mentioned in the declaration, are united in the same declaration, and jointly enter into the consent rule and plead, judgment may be given against them separately, if their separate possessions are found by the jury.

In the case before me the defendants did not plead jointly, but I cannot see that this would make any difference, according to our practice. Certainly a plaintiff in ejectment may recover to the extent he has proved. *Nahinai vs. Lai*, 3 Haw., 317. I do not think the plaintiff is charged with notice of the deed of partition between the defendants, so far as to hazard his recovery of the land by suing the plaintiffs jointly. In Sedgwick and Wait, on Trial of Title to Land, Sec. 239, the authors say: "At common law, in ejectment for lands, distinct parcels of which were in the several occupation of different per-

sons, no direct objection to the misjoinder could be made, as by plea in abatement, but the parties might apply to the Court to be allowed to enter into the consent rule and plead separately. But even if they pleaded jointly, evidence might be given on the trial to show that the defendants occupied distinct parcels, and in such cases, if the plaintiff was entitled to recover, there was verdict and judgment severally for the parcels respectively occupied by the defendants."

The plaintiffs made a deed of the premises to certain Chinese children, reserving a life estate therein to themselves and the survivor.

This estate is sufficient upon which to recover in ejectment against defendants.

Plaintiff may have judgment against Amana for the portion of land in his possession, and against Hopai Yet for the portion in his possession, and costs, except \$10, which must be paid by plaintiff, as the terms upon which an amendment was allowed.

Magoon and Kinney for plaintiffs.

Brown and Avery for defendants.

Honolulu, July 31st, 1886.

S. SELIG, Administrator of L. Ahuna *vs.* CHULAN & CO.

ASSUMPSIT. BEFORE JUDD, C.J.

AUGUST, 1886.

A claim paid by a debtor of an intestate, after the intestate's death, to a creditor of the intestate, cannot be set-off against the debtor's own promissory note to the intestate.

DECISION OF JUDD, C.J.

This is an action of assumpsit on a promissory note made by defendants in favor of plaintiff's intestate for \$2000, dated the 10th September, 1885, and payable in four months from date. Ahuna died January 7th, 1886, before the note became due, and S. Selig is the duly qualified administrator of his estate. The

making of the note is admitted by defendants, who plead an offset of \$1396.50, and tender the balance, \$671, in Court.

The plaintiff admitted the correctness of a part of the offset, to wit, the amount of \$735.25, being amount of defendant's own claim against the decedent, which was duly presented to the administrator on the 25th March, 1886, and by him allowed. The amount of \$623, claimed by defendants to have been paid by them to the firm of Kung Yit Lung & Co. on the 15th March, 1886, is resisted by plaintiff. Defendants say that they made this payment in pursuance of an understanding arrived at in October, 1885, between Ahuna, Kung Yit Lung & Co., and themselves—that Chulan & Co. should pay the bills for merchandise supplied by Kung Yit Lung & Co. to Ahuna up to \$1000, and it should be credited on their (defendants') note to Ahuna. This is not evidenced by any writing.

I do not think the set-off of \$623 can be allowed. There is no mutuality between the note of defendants to the intestate and the claim of defendants. The intestate never owed this sum of \$623 to defendants in his lifetime, for it was paid after his death, and no cause of action existed by defendants against the intestate at his death.

In *Waterman on Set-Off*, Sec. 197, the author says: "It is obvious that on principle, money paid for an intestate after his decease, upon a contract of suretyship entered into in his behalf during his life, cannot be set-off against a debt due his estate."

The case cited is *Granger's Administrators vs. Granger*, 6 Ohio, 35, and the Court say: "A liability only was incurred, upon which, on the contingency of the security being compelled to pay for the intestate, he would have the right of action for his indemnity. A bare possibility that in a certain contingent event he would have a demand, is not a debt due from the intestate, and such claim has not the mutuality required for a set-off. Such a demand though good against the estate, can only look to the general assets for satisfaction. To allow it to be offset would change the course of distribution of intestate estates."

I think the case at bar is stronger in favor of the view that the offset should not be allowed than the Ohio case, for it is very doubtful if the defendants' engagement to pay Ahuna's debt to Kung Yit Lung & Co. could be enforced, it not being in writing as required by the Statute of Frauds.

By our Statute of Set-Off, the defendant may plead an offset of like kind and denomination, existing in the same right, between him and the plaintiff.

Now, as there was no cause of action or demand existing in favor of defendants against the intestate at the time of his death, it cannot be considered that this set-off claimed existed in the same right between defendants and the plaintiff.

It has been held quite uniformly that a creditor will not be permitted to collect the demands of his deceased debtor and apply the proceeds to the payment of his claim against the debtor's estate. *Woodman's Administrators vs. Barker*, 2 N. H., 479. On the same principle, of a want of mutuality, it is held that if a person contracts a debt with the executor or administrator of a deceased person, and is sued for the same, he cannot set-off a debt due to him from the testator or intestate. See cases cited in *Waterman on Set-Off*, Sec. 181, note A.

Without enlarging on the cases, I am of opinion that a claim paid by a debtor of an intestate after the death of the intestate to a creditor of the intestate, cannot be set-off against the debtor's own promissory note to the intestate. Certainly, if the intestate's estate is insolvent, it would be gross injustice to the other creditors of the estate to allow this creditor to thus obtain a preference over all the others, and have his claim paid in full.

Judgment for plaintiff for the amount of the note and interest and costs from the day it was due, less the admitted set-off of \$735.25.

S. B. Dole, for plaintiff.

R. F. Bickerton, for defendants.

Honolulu, August 4th, 1886.

LEIAU *et al.* vs. KAHAI KALUA.

IN EQUITY. BEFORE PRESTON, J.

AUGUST, 1886.

Applications to set aside deeds should be discouraged, unless fraud is clear and palpable.

Plaintiffs having failed to allege or prove that a deed, sought to be set aside, is different from what the grantor intended, the bill is dismissed.

DECISION OF PRESTON, J.

This is a bill to set aside a deed of conveyance from the female complainant to the defendant, and for an injunction to restrain him from using, occupying, or disposing of the property comprised in the deed.

The deed in question was executed by the female complainant (Leiau) on the 11th of December, 1880, she being then a widow.

The deed purports to convey to the defendant in fee a piece of land situate on Fort street, Honolulu, in consideration of one dollar, and the agreement of the defendant to support "me (the plaintiff) until death, and I to live on the land till the end of my natural life."

The bill alleges that the defendant never paid the consideration of one dollar or gave any other consideration for the property. That the defendant hath not supported the complainant Leiau. That the property is worth about \$2000, and the complainant has resided thereon for the last thirty years and hath paid the taxes thereon.

The complainants charge that they have just reason to suspect, and do believe that the defendant obtained the said deed deceitfully, deceivably and fraudulently in this, that he did not intend at the time he obtained the said deed, nor at any time, to support the said Leiau according to his said promise and agreement. That the plaintiffs have no property except that mentioned in said deed, and that defendant has no property,

and is habitually intemperate. That the defendant has habitually annoyed and harassed the complainants in their possession of said property, and has often and recently told them to leave.

The defendant by his answer admits the agreement to support, and claims that he has done so to the best of his ability, and denies the other allegations.

At the hearing before me on the 6th instant, the complainants testified on their own behalf, also the two sisters of the complainant and the defendant, and the husband of one of them.

The evidence was to the effect that the defendant had not supported Leiau, the complainant; that there are four houses on the land, one of which had been occupied by the defendant with the consent of complainants, and jointly with them, until about two months ago; two were and are occupied by the sisters of Leiau, rent free, with the consent of the complainants, one is now and has been occupied by a tenant at a rental of \$8 per month, which rent was paid to Leiau; that within the last two months the defendant on three separate occasions told the complainants to leave; that on these occasions he was intoxicated, but that when sober he and complainant Leiau got on pretty well together.

No evidence was given as to the circumstances under which the deed was executed, and no other evidence of the alleged fraud.

At the conclusion of the testimony on behalf of the complainants, counsel, in answer to a question asked by the Court, claimed to be entitled to a decree in terms of the prayer of the bill and requested time to produce authorities.

On the 11th instant, counsel for the complainants argued the case and cited many authorities to the effect that an action at law for breach of covenant would not lie, and that the complainant's only remedy was in equity, and contended as charged in the bill that the non-compliance by the defendant with his agreement to support the complainant amounted to a failure of consideration, and was a fraud on his part and rendered the deed void *ab initio*.

I cannot agree with this contention. It is unnecessary for me to consider whether an action for breach of covenant will lie. The authorities cited by complainant's counsel do not in my opinion support his contention on that point. The passage cited by him from Wait's Actions and Defences, Vol. 2, p. 356, is not fully cited, and the part left out from the citation is clearly against the complainants.

In my opinion the complainants have not supported the claim for relief set up by the bill by evidence or authority.

Applications to set aside deeds are very frequent in this Court, and should be discouraged unless fraud is clear and palpable. It is not alleged that the deed is different to what the complainant intended.

No application has been made to amend the bill, which seems to have been prepared under an entire misapprehension of the law and the facts. I must dismiss it with costs, reserving the right to the complainants to take such other proceedings (if any) as they may be advised.

Bill dismissed with costs.

M. Thompson, for complainants.

Jona. Austin, for defendant.

August 16th, 1886.

In re J. H. CONGDON.

HABEAS CORPUS. BEFORE JUDD, C.J.

DECEMBER, 1886.

Although a Justice of the Supreme Court has the right, on *Habeas Corpus*, to review the acts by which the arrest of a party, on mesne process in a civil action, was obtained from another justice, yet the best course is to apply to the justice who issued the writ, on a motion to discharge the writ.

A seal is not necessary to the validity of a bond.

In a complaint for the arrest of a debtor, alleged to be about to quit the Kingdom, an averment verified by oath, on information and belief, that defendant is about to quit the Kingdom, is sufficient: and it is not necessary to add "with intent to evade payment of his debts."

DECISION OF JUDD, C.J.

The petitioner was sued on the 20th instant by one Ackerman, master of the schooner Geo. C. Perkins, who claims \$509.63 for freight and primage on 250 hogs shipped on board this vessel at San Francisco, for Honolulu, by Congdon, at his risk, according to the bill of lading, and alleges that the freight was due and payable at Honolulu on the 18th October, 1886, when the hogs (except such as had died on the passage) were delivered to him.

On the 22d the plaintiff, by F. A. Schaefer, his attorney in fact, presented a petition entitled in the above action to a Justice of this Court, alleging that the said Ackerman, as master of the said G. C. Perkins, had brought a suit against said Congdon to recover certain amounts for freight upon the carriage of live stock which became due and payable at Honolulu on the arrival of the said vessel on the 18th day of October, 1886; that this petitioner has good reason to believe and alleges upon information and belief that said J. H. Congdon is about to quit this Kingdom; whereupon he prays that process may issue for the arrest and detention of said J. H. Congdon until he shall have entered into security with sufficient sureties to abide

the result of said suit and pay such judgment as shall be rendered thereon.

The jurat is as follows:

"Hawaiian Islands, Oahu, ss. Personally appeared F. A. Schaefer and made oath that the matters above alleged are true, to the best of his knowledge and belief. Subscribed and sworn, etc.

"F. A. SCHAEFER."

The justice applied to allowed the process of arrest to issue on the filing of a bond in the sum of \$500, conditioned to indemnify said Congdon in case said plaintiff fails to maintain his suit, and the arrest was made on the same day. The petitioner on the next day applied to me in due form for a writ of *habeas corpus* which was issued and returned the same day.

I wish to remark *in limine* that though persons committed on mesne process in any civil action on which they were liable to be arrested and imprisoned, unless when excessive and unmeasurable bail is required, are not entitled as of right to demand and prosecute writs of *habeas corpus*, a Justice of the Supreme Court is allowed by a subsequent section of the Act the discretionary power to issue a writ of *habeas corpus ad subjiciendum* where it is not demandable of right, and thereupon to admit to bail or to discharge the petitioner as law and justice may require.

This gives me at my discretion authority to review the acts by which the arrest on mesne process in a civil action was obtained. I still think, as intimated at the argument, that the best course to pursue would be to apply to the justice who authorized the writ, on a motion to dissolve the attachment and discharge the respondent from custody. This would avoid the unseemly clashing of authority which might occur. This was the course followed in the case of *The King vs. Huntley*, 2 Hawn., 457.

One of the grounds for claiming that the petitioner be discharged is that the bond tendered by the plaintiff in asking for the process of arrest is not sealed with the seals of the principal and surety.

I find that the instrument is in substance a bond, and on the authority of *Campbell vs. Manu*, 4 Haw. n., 459, I hold that a seal is not necessary. The common law definition of a bond is an obligation to pay money, and it must be sealed, but, as repeatedly laid down in this Court, the common law is not in force in this Kingdom any further than its reasonings and principles have been adopted. There is no statute here defining a bond to be a sealed instrument or making a seal essential to its validity any more than to a conveyance of land. The distinction between sealed and unsealed instruments is not preserved in our code, and I know of no reason why an obligation, which purports to bind the obligors to pay a certain sum of money to the obligee on the contingency named, should be defeated because the artificial and formal act of affixing a wafer or making a scroll after the names of the obligors has been omitted. By all the authorities, moreover, the omission can be supplied.

A more serious objection is that the jurat is insufficient. It is urged upon me that the oath should be positive as to the facts set forth, and not, as in this case, that they are "true to the best of the knowledge and belief" of the affiant.

Rule 27 of the Supreme Court requires that in equity and admiralty all facts should be verified absolutely, and matters of belief and recollection by a separate clause.

Section 1099 of the Civil Code prescribes that "every civil action hereafter to be tried in any of the Courts of Record in this Kingdom shall be commenced by petition, which petition shall be verified by the oath of the plaintiff or some one on his behalf deposing to the best of his knowledge and belief." The 953d Section of the Code, which authorizes the arrest of a debtor, prescribes that the complaint shall be "verified by the oath of the plaintiff or some one in his behalf."

In this connection I must consider another objection made, that the allegation that plaintiff "has good reason to believe and alleges upon information and belief" that said J. H. Congdon is about to quit the Kingdom, is insufficient, as it is

not a positive averment that Congdon is about to quit the Kingdom. I am at a loss to perceive how a matter which is an intention merely, of another person, can be otherwise alleged truthfully. "Being about to quit the Kingdom" means that there is an intention to quit the Kingdom which is about being carried out. This may be locked entirely in the breast of the party so intending, and only his acts and words which indicate this may be known to the plaintiff. This is a purely statutory matter, and, as Chief Justice Allen said in *Huntley's Case*, when the statute is followed, the allowance of the writ is a matter of right.

Our statute does not require, as the Canadian Statute, that it must be alleged that the "plaintiff has reason to believe and verily believes for reasons specifically stated in the affidavit," that the defendant is about to quit the Kingdom. It may be that the statute should require that the reasons which have operated to induce the belief that the defendant is about to quit, should be specially stated in the complaint in order that the Court may be able to determine whether the belief is well founded or not, but the simple answer to be made in this case is that our law does not now require this, and I am of the opinion that an allegation that the plaintiff has good reason to believe and alleges upon information and belief that the defendant is about to quit the Kingdom, verified by oath in the same way, *i.e.*, that the facts stated are true to the best of the affiant's information and belief, complies with the statute and is sufficient.

The remaining point is that there is no proper allegation of a debt due and owing, or that the defendant is about to quit the Kingdom with the intent to evade the payment of his debts, or, what would be nearly equivalent, without having made provision for the payment of the debt.

As regards the point that no debt is alleged to be due, I think that as this is a petition for arrest of the defendant ancillary to the former suit between the parties, the former declaration was presumably referred to by the justice who granted the warrant.

This states most unequivocally that the debt for freight became due on the arrival at Honolulu of the vessel which carried the petitioner's live stock.

The petition for process of arrest sufficiently states it as well.

A critical study of the 953d Section of the Civil Code is necessary in order to decide whether the last point above made is tenable, *i.e.*, whether it is essential to allege that the defendant is about to quit the Kingdom with the intention to evade the payment of the debt. The law reads: "Upon a complaint verified by the oath of the plaintiff * * stating that a defendant" has, etc., that is, this presupposes a suit by a plaintiff against a defendant, and the process of arrest may be asked for contemporaneously with the complaint, or it may be, as in this case, by a separate complaint.

Now, what must be alleged to entitle the plaintiff to ask for a warrant?

I find that the statute requires one of three circumstances to exist: 1. That the defendant has contracted the debt in a fraudulent manner. 2. That he seeks to evade the payment of the debt or liability to plaintiff either by secreting his property, or by transferring or intending to transfer it to a third party, or is about to remove it out of the jurisdiction of the Court; and 3. That the defendant is about to quit the Kingdom. The statute does not say that the defendant must be alleged to seek to evade the payment of his debt to the plaintiff by leaving the Kingdom. The clause "or is about to quit the Kingdom," is not coupled with any such antecedents. It stands alone as one of the causes upon which a warrant of arrest for a debtor may issue. There is much force in the argument made that the leaving of the Kingdom by a defendant may not imperil the collection of the plaintiff's claim. This is particularly true of residents here possessed of landed property, and their presence in Court as defendants is not necessary to the enforcement of claims against them. It may be that the changed circumstances of this country since this law was enacted make it desirable that this process should be applied only to those who

seek by quitting the Kingdom to evade the payment of their debts. But these are considerations to be addressed to the Legislature.

I must administer the law as I find it, and the complaint setting forth that the plaintiff has good reason to believe and so alleges that the defendant is about to quit the Kingdom, the statute is complied with and thus far only can I enquire on *habeas corpus*.

The prayer of the petitioner is refused and he is remanded into custody.

Ashford & Ashford, Neumann and Dare, for petitioner.

F. M. Hatch, for the Marshal, respondent.

Honolulu, December 24th, 1886.

In re WIDENING OF FORT STREET, HONOLULU.

APPEAL FROM AWARD OF COMMISSIONERS. BEFORE PRESTON, J.

JANUARY, 1887.

Where a statute confers on the Government the right to take private property for public use, every form and particular required by such statute must be complied with.

The award of commissioners, as to assessments and damages for widening a street, set aside for failure to comply with the statute: it appearing that said commissioners were improperly appointed: that no computation of the expense of widening the street was furnished them: and that they failed to notify interested parties to appear and present their claims.

DECISION OF PRESTON, J. ON APPEAL OF H. BRADLEY.

This is one of six appeals brought against the awards of Commissioners for assessing compensation to be paid to the owners and occupiers of property taken by the Government for the purpose of widening Fort street, Honolulu, and to determine the amount of benefit accruing to each estate by reason of such widening.

The facts being substantially the same in all the cases, it was agreed that the matters of law involved in this case should first be determined, and that the decision therein should govern all.

In order to understand the nature of the appeal, it is necessary to consider the course of legislation on the subject.

Sections 184, 185, 186 and 187 of the Civil Code are as follows:

"Section 184. Upon the request of fifty or more polltax-payers, of any district, to the Minister of the Interior, that a new road be opened, or that an old road be shut up in that district, said Minister may appoint a jury of twelve persons to decide on the propriety of the measure proposed, and their decision, when agreed to by at least nine of said jury, may be acted upon by the road supervisor of such district.

"Section 185. In laying out any new road or highway, respect shall be had to the private vested rights of property which any individual may have in the land over which said road or highway shall be intended to pass. It shall be the duty of the road supervisor, immediately after such new road or highway shall have been determined upon, to cause notices to be posted along the line of the same, advertising the fact, and calling upon all persons interested therein to bring forward their claims to the nearest Circuit Judge; and it shall be the duty of such Circuit Judge to forward a list of such claims to the Minister of the Interior.

"Section 186. Upon the receipt of such claims, the Minister of the Interior may appoint a commission of three disinterested persons to assess the value of the private property so required for the public use, and also the damages, if any, likely to be sustained by the owner, whose decision shall determine the price to be given by the Government for such private property; and said commission shall send a certified copy of their decision to the Minister of the Interior, and another to the party making the claim.

"Section 187. Upon the delivery of said decision to the owner of the land, the property assessed shall revert to

the Government for the public use intended, without further conveyance; and the holder of such decision shall present the same to the Minister of the Interior for adjustment pursuant to the provisions of the next succeeding section."

The law as it then stood made no provision for altering or widening roads or highways, and it would seem that, in the cases provided for, the Minister was not authorized to pay any claims until the amount had been ascertained by the Commissioners, and that he might issue one general commission to assess the amount payable to all the claimants.

In the year 1870 an Act was passed: "To provide for the assessment of a part of the expense of constructing roads upon estates benefited thereby."

Section 1 of this Act provides that: "Whenever a commission shall be appointed within the electoral districts of Honolulu and Hilo, pursuant to the provisions of the 186th Section of the Civil Code, to assess the value of private property required for public use, in the laying out of a new road or highway, the commission shall determine what estates are especially benefited by such road or highway, and the amount of special benefit accruing to each."

Section 2 provides that: "The commission shall award the proportion of the whole expense of laying out and constructing the proposed road or highway, which ought to be assessed upon estates benefited, and the proportion to be paid for from the public treasury."

Section 3 provides that: "The commission shall report, in writing, to the Minister of the Interior the whole amount which ought to be assessed upon estates benefited, and the amount of special benefit accruing to each estate; and thereupon the Minister shall cause to be computed the rateable proportion of cost to be borne by each estate, in excess of the assessed value of any portion of the same estate which may be required for the proposed highway."

The statute then provides for the filing of the certificate of computation with the Registrar of Conveyances, and makes the

amount due to the Government a charge upon the estate, and provides for service of a copy of the certificate upon the owner of the estate, and for a sale of the property upon default in payment.

This statute provides for an appeal to the Supreme Court by any person aggrieved, and the appeal is brought by virtue of this statute.

In 1872 the law was altered in some most essential particulars, and the mode of procedure substantially altered.

By this last-mentioned law, Sections 184, 185 and 186 of the Civil Code are amended to read as follows:

“Section 184. Upon the request of fifty or more tax-payers of any district to the Minister of the Interior that a new road, highway or street be opened; or that an old road, highway or street be shut up or widened or altered; or if it shall be made to appear to the Minister of the Interior in any other way that any road, highway or street should be opened, widened or otherwise altered, the said Minister of the Interior shall request any judge of a Court of Record to select a list of twenty-four names from among the legal voters of the district in which the improvement or alteration is contemplated, from which such judge shall direct the Marshal of the Kingdom or the Sheriff of the island in which the improvement is contemplated, to draw a jury of six persons to decide on the propriety of the measure proposed, and the decision of such jury, or a majority of them, shall be certified immediately to the Minister of the Interior, who is hereby authorized and empowered to take action in accordance with such decision of such jury.

“Section 185. In laying out, closing or widening any road or highway, respect shall be had to the private vested rights of property which any individual may have in the land affected by any such proposed work. It shall be the duty of the Road Supervisor, immediately after such proposed work shall be determined upon, to cause notices to be posted along the line of such proposed new road, street or highway proposed to be closed, opened or widened, or altered, advertising the fact and

calling upon all parties interested therein to bring forward their claims to the nearest Circuit Judge, Police or District Justice; and it shall be the duty of such Judge or Justice to forward a list of all such claims to the Minister of the Interior.

“Section 186. Upon the receipt of such claims, if the Minister of the Interior and the several claimants cannot agree upon the amount to be paid to such claimants, the said Minister shall appoint three disinterested persons as commissioners, or may request any judge of a Court of Record to cause a jury to be summoned and drawn in like manner as in the first section provided (184), to assess the value of the private property, or such damage likely to be sustained by the owner or occupier of any land to be taken for the proposed improvement, whose decision, or the decision of a majority of them, shall determine the price to be given by the Government for such private property, or for such damages as the case may be, and such Commissioners or jury shall send a certified copy of their decision to the Minister of the Interior, and another to the claimant.”

The law further provides that all the provisions of said law of 1870 shall apply to the widening or altering any road, etc., and that the jury shall have the same powers as the commissioners provided for in that act.

On the 22d of March, 1886, the Minister of the Interior, acting under the powers conferred upon him, addressed a request to the Chief Justice, stating that it had been made to appear to the Minister that Fort street, between King and Merchant streets, should be widened, and requiring the Chief Justice “to cause a jury to be selected in accordance with law to decide upon the advisability of the proposed improvements.”

The Chief Justice thereupon issued an order to the Marshal to draw a jury as required, and directed the Marshal to certify the finding of the jury to the Minister of the Interior.

The Marshal drew the jury from the list of twenty-four voters selected by the Chief Justice, and attended with them on the 23d March to view the locality, and the jury having recommended the proposed alteration, the Marshal certified the same to the Minister of the Interior.

It was contended on behalf of the appellant that these proceedings were irregular on the grounds:

1. That there was nothing on the record to show what caused the Minister of the Interior to widen the street. If not upon a petition by fifty taxpayers, then it should appear on record in what other way it was made to appear to the Minister that the street required widening.

2. That the Marshal should not have certified the finding of the jury to the Minister, but the verdict should have been certified under the seal of the Court.

I am of opinion that these objections are not sound, and that up to this time all the proceedings were regular and in accordance with law.

With regard to all the subsequent proceedings taken, a careful consideration of the law and the various papers and documents put in evidence, lead me to the conclusion that the award of the commissioners cannot be sustained.

I will, therefore, set out the proceedings which I consider the law requires to be taken, and point out where, in my opinion, the law has not been observed.

After the certificate of the finding of the jury has been filed with the Minister and the work has been determined upon, it becomes the duty of the Road Supervisor to cause notices to be posted along the line of road, calling upon all parties interested to forward their claims, etc.

The Road Supervisor did post a notice purporting to be in conformity with the statute, but such notice, so far as is necessary to set it out, only notified "all owners of property to send in their claims," so that occupiers and lessees who are not within the term *owners* were not notified, as they would have been had all persons interested been notified as required by the statute.

In accordance with the notice given by the Road Supervisor, the appellant (Bradley) and three other owners of property, viz., W. E. Foster, another appellant, and Mrs. Lack and A. L. Smith filed their claims with the Police Justice, Bradley claim-

ing \$6000. These claims were forwarded by the Police Justice to the Minister of the Interior on the 27th March, 1886.

On the 30th March, the Minister of the Interior, purporting to act under the laws before mentioned, appointed R. F. Bickerton, M. P. Robinson and S. M. Damon a "special Board of Commissioners to consider the claims, and to assess the damage likely to be sustained by the owners and occupiers of land to be taken, and to determine what estates are especially benefited, and the amount of benefit accruing to each by reason of the widening of Fort street between Merchant and King streets." * * * "To do and perform all the duties set forth in said laws and all other laws of this Kingdom which are applicable to such commission."

It was objected on behalf of the appellant that it did not appear from the record that the Minister of the Interior and the several claimants were unable to agree upon the amounts to be paid to the claimants.

By Section 186 of the Civil Code, before it was amended, it would seem that upon the receipt of the claims, the Minister had no discretion as to settling them, but that he was obliged to appoint a commission to ascertain the amount payable.

This was altered by the Act of 1872, amending the Section, and I am of opinion that by such amendment the Minister was precluded from issuing a commission, unless the Minister and the claimant had disagreed as to the amount payable, and that some endeavor should have been made by the Minister to adjust the amount, or notice given to the claimant that the Minister considered the amount claimed to be excessive.

An attempt was made at the trial to prove this by the evidence of Mr. Gulick (the Minister of the Interior at the time these proceedings were taken), who testified "after receiving the claims there was a disagreement between the Minister and the several claimants—Bradley's was greater than I thought to be just by myself."

On cross-examination the witness admitted that the conversations which he had with Bradley were on the street and after the notice of appeal was given.

Under these circumstances I am of opinion that the appointment of the commission was invalid, and I might here rest my judgment. But the other questions raised are so important to the public that I deem it best to deal with every point raised.

On the 31st March, the commission reported to the Minister and awarded for damages to the appellant "H. Bradley for 245 square feet @ \$6, \$1470."

The other claimants were also awarded damages at the rate of \$4.50 per square foot.

The commissioners recommended that the expenses of altering buildings should be paid by the Government. The commissioners also adjudged to be paid by the several properties therein mentioned, for betterments, the sum of \$5 per foot frontage for owners, and \$2.50 per foot for tenants. Bradley's share amounted to \$232.75.

The Minister of the Interior then computed the amounts payable to each claimant, and the amount payable by estates benefited, the amount payable to claimants for damages being \$2491.50, and the amount to be paid by the several owners and occupiers for benefits being \$2847.15.

In assessing the various amounts, the commissioners did not see any of the parties interested, or take any evidence in support of the claims, but merely examined the properties and used their own judgments as to the amount of damage, etc. This, I believe, had been the usual and customary course taken by commissioners in like cases.

The commissioners did not forward to the claimants a copy of their award, and the first the claimants knew of it was by a receipt of a notice from the Minister, dated the 1st April, notifying the parties of the amounts receivable or payable by them.

The Minister filed his computation with the Registrar of Conveyances, the effect of which, supposing the proceedings to have been valid, was to vest the several properties proposed to be taken in the Government without further conveyance.

It was objected in behalf of the appellants that the award

of the commissioners was premature in that no computation of the expense of widening the street and laying it out had been made, and that it did not appear that any such computation had been furnished the commissioners. (See law before set out.) It was admitted that no such computation had been made.

I have no hesitation in holding that those objections must be sustained. I cannot conceive that it was the intention of the Legislature that any person should be deprived of his property, or that his property should be charged with the payment of large sums of money for so-called benefits, without giving him an opportunity of being heard in support of his claim or against the charge assessed.

It was the duty of the commissioners, acting as they were to a certain extent in a judicial capacity, to appoint a time and place for hearing the parties interested; to hear such testimony as might be adduced. As to the computation of the costs to be assessed on estates benefited, it was absolutely necessary that the commissioners should have been furnished with a computation of the estimated cost of the work, as otherwise it was impossible for them to compute the amount "to be paid by the Public Treasury," which, indeed, the commissioners did not compute.

It appears to me that by the amendment of Section 186, the Legislature has rendered it impossible for the commissioners, or a jury appointed to assess damages sustained by parties whose property may be injured by the work, to assess the amount of benefits accruing to their estates (even supposing the law authorizes such assessment), but that in cases where it is thought proper that such assessment should be made, a separate commission should issue, but this is not a matter brought up by this appeal.

The Constitution provides that no person shall be deprived of * * * "property without due process of law," and it is undoubted law that when a statute confers upon the Government or other parties the right to take another's property for

public purposes, every form and particular required by such statute must be complied with.

If property could be taken under such a procedure as was used in this case, the Constitution would be violated in one of its essential parts.

My judgment is that all the proceedings after the filing the finding of the jury are null and void, and consequently the appeal is sustained.

If I had the power I would order the certificate of computation now on record to be cancelled, but I must leave the parties to take such steps for that purpose as they may be advised.

W. A. Whiting & Cecil Brown, for appellants.

A. Rosa (Deputy Attorney-General), for Government.

Honolulu, January 25th, 1887.

S. G. WILDER *vs.* W. G. ROLAND *et al.*

IN EQUITY. BEFORE McCULLY, J.

JANUARY, 1887.

A trust deed expressed that the property conveyed was for a wife's separate use and was not to be mortgaged or alienated. Husband and wife mortgaged the property to secure a debt for lumber to repair the family dwelling:

Held, the mortgage was invalid: and the plaintiff's claim stands on its common law footing and cannot be enforced in equity.

DECISION OF McCULLY, J.

The bill alleges that on November 13, 1876, the defendants executed, acknowledged and delivered to the plaintiff a mortgage on certain premises to secure the payment of \$387.99 which, with interest, is in default and due; that concurrently with the mortgage the defendants made and delivered a promissory note, which the plaintiff has lost; that consideration of the note and mortgage was a bill of lumber purchased of the

plaintiff by defendant W. G. Roland, and alleges that this lumber was used to build a residence upon the premises in question, in which the defendants have dwelt since and till now; that the defendants have recently made leases of portions of these premises, of which rents are about to become due.

The prayer is for foreclosure of the mortgage, and, pending proceedings, an injunction from collecting the rent.

The answer admits the execution of the mortgage and the non-payment of the sum intended to be secured by it, but alleges that large sums have been paid on account of the original account between the parties, and claims that as far as they are individually concerned, the amount secured by the mortgage has been barred by the Statute of Limitations. That the indebtedness was the individual debt of W. G. Roland for which the separate estate of Helen Roland is not liable; and further says that the land referred to in the mortgage was conveyed in 1865 by Frank Metcalf and Julia Prosser to William G. Roland, defendant, upon express trust to hold for the benefit of the said Helen Roland for her sole, separate and only use and benefit free from the debts, engagements and liabilities of her then or any future husband, and that she was therein restrained from the power of alienation and anticipation of the income from said premises.

Helen Roland says that she does not remember to have signed a promissory note concurrently with the mortgage; and W. G. Roland neither admits nor denies having signed a note, and says he does not remember giving a note.

The defendants admit that the foundation of the debt was the sale of lumber to W. G. Roland, and allege that it was for his individual debt. They deny that the lumber was used to build a house, but say it was used to repair and enlarge a house then on the premises and occupied by them.

The respondent, W. G. Roland, further says that the existence of said trust and the restraints upon alienation and anticipation was known to the complainant, but he urged him to raise money by a mortgage, and procured this instrument to be drawn which

he might assign and raise money on, and that so the respondents executed it in consequence of repeated solicitations, and merely for complainant's accommodation.

The instrument, which is the foundation of this suit, is a conveyance from Frank Metcalf and Julia Prosser in consideration of love and affection to their sister Helen Roland, and of one dollar to each of the grantors paid by William G. Roland, to him, his heirs and assigns, to hold in trust to the use of Helen Roland for her life, for her sole, exclusive, separate and only use and benefit, free from the debts, engagements and liabilities of her present or any future husband; and, after her decease, in trust for all the children of this marriage, their heirs, etc., or failing issue surviving, then absolutely to the trustee, he surviving.

"And it is hereby declared and agreed that the said Helen Roland shall not have power to sell, mortgage, or in any way charge or incumber the premises, nor shall she have any power to anticipate the growing rents."

Should the trustee die, refuse to act, or depart from the Kingdom and remain absent for a year, the grantors, or either of them, may appoint another trustee in his place. This deed and agreement the four parties sign and acknowledge.

BY THE COURT.

The question to be considered is whether the Court will sustain a restraint on alienation and anticipation of the life estate of a married woman vested in her trustee. Such restraint is imposed in the clearest terms in the deed before us. It has to be conceded by counsel for the petitioner that the authorities all support the proposition. See *Cahill vs. Cahill*, L. R., 8 App. Cas., 420; *Pike vs. Fitzgibbon*, L. R., 17 Ch. Div., 454; *Stanley vs. Stanley*, L. R., 7 Ch. Div., 589; *Bramon vs. Stiles*, 2 Pick., 460; *Broadway Bank vs. Adams*, 133 Mass., 170. The latter case holds this in case of a devise to brother. See also Perry on Trusts 2, § 671, with citations.

Is there a paramount equity in this case?

The lumber, which was the foundation of the debt, was used

by the husband (trustee) to enlarge and repair the family dwelling, and this the counsel for plaintiff contended creates an equity supporting the validity of the mortgage.

Not so in my opinion. The debt was the debt of the husband. He was bound to provide shelter for the wife. By the same view the provisions of the trust could be set aside for any debt contracted by the husband for the support of the family. Such a trust would, then, be of no validity.

The fact that the wife may have signed the note, though this is not proved, will not assist the claim on the property.

The restraint on alienation is equally binding on her. There is no reason in public policy why this restraint should not be sustained.

The creditor of Roland had this deed of trust on the record for inspection, and had the deed itself in his hands, with the averment of Roland that he held no estate on which he or his wife could give valid security. It cannot be said that credit was given on the faith of this property.

If I dismiss the bill so far as the mortgage is concerned, is there any reason why the Court in Equity should take further cognizance of the case? I think not.

Equity having taken jurisdiction, will proceed further to adjudicate other matters not of themselves and alone within equity jurisdiction; but I do not consider that a footing in equity is gained by a claim upon an invalid mortgage, so that a Court should, this being so declared, then proceed to enjoin rents and profits, appoint a receiver, or order application of rents to payments on account.

The plaintiff's claim stands, without the security of mortgage, on its common law footing.

The temporary injunction is hereby dissolved, and the bill dismissed.

Ashford & Ashford, for petitioner.

F. M. Hatch, for defendant.

Honolulu, January 28, 1887.

MAKAUHANNA *et al.* *vs.* PUA *et al.*

EJECTMENT. BEFORE JUDD, C.J.

FEBRUARY, 1887.

A widow may be barred of dower by adverse possession of heir or devisee of her husband: but her ouster must be shown.

DECISION OF JUDD, C.J.

This is an action to determine the right of dower by one Makauhana (claiming to be the widow of one Imihia), in land situate in Kapalama uka, Honolulu, being that described in Royal Patent No. 5550, to said Imihia. I find it established by the evidence that Makauhana married Imihia in 1859; that Imihia died in 1863, leaving a will in which he devised his estate to one Wahamana (w.) but made no mention of his wife.

The will was admitted to probate in March, 1863, and the testimony shows that testator's wife Makauhana was then absent on Maui.

Wahamana sold this land to Pua, the defendant, by deed dated 15th April, 1868, and she is now in occupation of the land by her tenant Kanalo, and claims title.

Counsel for defense claim that by the Statute of Limitations plaintiff is now barred of her right of dower, having been out of possession of the land twenty years.

I think a widow may be barred of her dower by adverse possession of the heir or devisee of her husband for twenty years, but her ouster must be shown.

In the case before me the proofs are that the widow continued, with a brother of her's, to live on the land for eight years after the death of her husband, say till 1871. There is, moreover, no proof of ouster till 1869, when defendant says she met plaintiff's demand for her interest in the land with a denial of her right, and told her to bring a suit if she chose.

The statute, therefore, has not run against the plaintiff's claim.

Damages are claimed for the detention of the dower interest. The proof is that the land was worth \$25 per annum.

I do not think more can be recovered than for six years last past, or for one-third of \$150.

Judgment may be entered for plaintiff for her dower in the land and for \$50 damages, and costs.

The case is discontinued by plaintiffs as to Mokunui.

Kinney & Peterson, for plaintiffs.

Holokahiki & Kane, for defendants.

Honolulu, February 15th, 1887.

WILDER & CO. *vs.* HOP WO WAI CO.

DECISION OF JUDD, C.J.

MARCH, 1887.

Under modern pleading it is not proper to style an action of assumpsit "trespass on the case upon promises:" but it appearing from the declaration that the action is assumpsit, the objectionable averment is treated as surplusage.

DECISION OF JUDD, C.J.

This action is demurred to on the ground that although it is entitled "assumpsit" by the form of the declaration, plaintiff complains of defendants "in a plea of trespass on the case upon promises."

After having reviewed all the authorities presented, to wit: Stephen on Pleading, pp. 17, 18 and 40; Kerr's Action at Law, pp. 119, 120; 1 Chitty Pl., p. 99; I am of opinion that it is not consonant with the modern rules of pleading to designate an action which is *ex contractu* as "Case," although anciently assumpsit was trespass on the case upon promises. "Case" is suited to torts or actions *ex delicto*.

But although the complaint styles this action "trespass on the case upon promises," from what follows it is, to my mind,

an ordinary declaration in express assumpsit upon a promissory note. The making of the note and the promise to pay is laid in apt words, and a copy of the note is annexed to the declaration and made part thereof. The *ad damnum* is laid at \$1200. The note is for \$750.21 and interest at ten per cent. per annum; and the principal and interest since September 28th, 1883, when the note was made, would nearly come up to the *ad damnum*. The amount of the *ad damnum* laid cannot affect the case, provided only that the plaintiff can recover no more than he asks for, and he cannot recover in this case, except for principal and interest and costs.

I do not think the declaration is demurrable on the ground stated. The objectionable phrase which names the action may be treated as surplusage.

I therefore overrule the demurrer with costs. Defendants may answer over in four days, and the answer must conform to the Statute of 1876.

Ashford & Ashford, for plaintiffs.

W. R. Castle, for defendants.

Honolulu, March 5th, 1887.

YIM QUON *vs.* A. J. CARTWRIGHT, Guardian.

IN EQUITY. BEFORE PRESTON, J.

MARCH, 1887.

Plaintiff in equity alleged eviction from leased premises by the Government under alleged right of eminent domain: held, on demurrer, that the allegation was sufficient, and whether the Government took legal steps in the eviction is a matter of proof.

If plaintiff's allegations are true, he is entitled to an apportionment of rent, unless he has deprived himself of it by his conduct or neglect.

DECISION OF PRESTON, J.

The bill alleges a demise by Waiaha and Kaululena, her husband, to the complainant, of a piece of land upon Maunakea

street, Honolulu, for fifteen years from December 1st, 1881, at \$25 per month, payable monthly in advance. That said lease contains a covenant for quiet enjoyment. That the reversion had been conveyed to George Holt and Annie Holt, minors, and that the defendant, Cartwright, had been duly appointed guardian. That the complainant had attorned and paid rent to the defendant as such guardian. That on the 18th of April, 1886, the buildings upon said land were destroyed by the fire that then swept over a large portion of the city. That immediately after the said fire the then Minister of the Interior issued a proclamation forbidding the rebuilding of structures upon certain portions of the burnt district, including the land so leased to complainant. That sometime after, in the said month, the Hawaiian Government, acting under its right of eminent domain, took possession of and evicted complainant from more than one-half of said premises, and that said eviction continues. That a portion of said premises from which complainant has been evicted consists of a strip about ten feet wide along said Maunakea street, and incorporated therein, and another strip about thirty feet wide along the makai side of said premises, which has been incorporated in New street. That the value of the premises left in possession of complainant is only one-half of the value of the whole premises comprised in said lease. That complainant has received no compensation from any source for such eviction. That complainant has paid no rent since said month of April, but has offered to pay a proportional part to the defendant, and that defendant has refused; and avers continual readiness and willingness to pay such proportional part.

The bill then avers proceedings by the defendant in the Police Court, Honolulu, against the complainant for a forfeiture for non-payment of rent, and prays for an apportionment of the rent and an injunction against the proceedings in the Police Court.

The defendant demurs to the bill: 1. For want of equity, and which was chiefly relied upon in the argument. 2. That it nowhere appears in said complaint that the complainant has

been evicted from any portion of the premises by a paramount title, or that the eviction alleged was legal, or that the Hawaiian Government has taken such steps as to acquire and perfect a legal title to such portions of said premises as complainant claims to have been evicted from, or that the eviction has continued to be and now is legal and by a paramount title.

I am of opinion that the bill discloses sufficient equity to put the defendant to answer. The bill might have alleged the matter more specifically, but it does allege an eviction by the Hawaiian Government by right of eminent domain, and I think I must presume, for the purposes of this case, that the Government has done all that is necessary by law to entitle them to evict the complainant. This is a matter of fact which must be proved at the hearing, if disputed by the defendant.

Supposing the allegations to be true, the complainant would be entitled to have the rent apportioned, unless by his conduct or neglect he may have deprived himself of this right as against the defendant.

I cannot understand by the allegation, that he has not received any compensation, whether he means that none has been awarded to him or that, if awarded, it has not been paid.

I overrule the demurrer; the defendant may answer within fourteen days.

Ashford & Ashford, for complainant.

W. A. Kinney, for defendant.

Honolulu March 9, 1887.

NAKAMURA MUNATARO *vs.* A. W. HAALILIO, District Justice.

MANDAMUS. BEFORE JUDD, C.J.

MARCH, 1887.

Section 915, Civil Code, as amended, giving District Justices jurisdiction of civil cases under \$200, does not conflict with Section 1423 giving a special jurisdiction over masters and servants.

The pendency of a suit by a contract servant for wages is no bar to an action by him to cancel the contract for a breach by the master.

DECISION OF JUDD, C.J.

The petitioner, by his attorney, Mr. Katsura, applied to me for a writ of mandamus, setting forth that on the 10th of February, 1887, the petitioner sued out from respondent, who was Deputy District Justice of the District of Hamakua, Hawaii, a summons against one W. H. Purvis, of Kukuihaele, Hamakua, Hawaii, the master of said petitioner, under a written labor contract, to cancel said contract on the ground of a breach thereof, praying for costs, etc.

Both parties were summoned by said respondent to appear before him on the 14th of February, 1887, and they duly appeared; but the said respondent refused and declined to hear the case, and forfeited the costs deposited by petitioner. The petitioner prayed this Court to issue a writ of mandamus to show cause why the said trial should not be held.

This Court issued a writ on the 5th of March, commanding the said respondent to hear the case without delay, or show cause why he should not within ten days after the service of the writ upon him.

On the 21st of March an answer came from respondent, admitting that he issued a summons on the 10th of February, 1887, against W. H. Purvis on petition of the said Nakamura Munataro, to cancel the labor contract between them, and the respondent sat on the 14th of February, as Deputy District Justice of Hamakua, to hear the case. The petitioner claimed that

he was a servant bound to serve W. H. Purvis, the defendant, under a labor contract, and alleged that the contract was broken by defendant, and the law of masters and servants violated, and asks the Court to annul the contract and to award damages and costs to plaintiff in accordance with Section 1423 of the Civil Code.

Counsel for the defendant, J. K. Kaunamano and Z. Paakiki, urged that the 1423d Section of the Civil Code was repealed by Act of the Legislature approved on the 13th of July, 1874; also, that this is a civil case, and the amount of damages is not laid in the complaint; also, that Nakamura Munataro had brought suit against his master, W. H. Purvis, before J. P. Miao, District Justice of Hamakua, to cancel the contract, on the ground that his master owed him, but the District Justice had not decided the case.

The answer further says that respondent decided not to hear the case because he was of opinion that as the Act of July 13, 1874, repealed "all laws and parts of laws inconsistent therewith," it repealed Section 1423 of the Civil Code, and the Court has now no jurisdiction to try cases for infringement of contracts between masters and servants. Also, that as the District Justice had entertained the case of the plaintiff against defendant, and decided against him in part, and held the case as regards the suit for \$18 wages, the respondent decided the case in favor of the defendant, and ordered him to pay costs of \$3.50.

The petitioner demurs to the answer, and avers that the Act of 1874, referred to in the answer, only regulates the general jurisdiction of District Justices with regard to civil cases founded on pecuniary demands, and has nothing to do with the relations between masters and servants, and over which the District Justices have, by law, jurisdiction conferred upon them. Also that a pending suit for wages between the same parties in the same Court is no bar to an action to cancel the contract.

BY THE COURT.

It is to be regretted that the respondent has not appeared by counsel or in person, but relies upon his answer. I find from

the statement of petitioner's counsel that J. P. Miao, the District Justice, declined to allow the uniting of the two actions—one for wages, and one to cancel the contract—and that is all that was done by him; but that the Deputy Justice, A. W. Haalilio, who acted in the absence of Miao, heard the points of defendant Purvis' counsel, and merely declined to try the case. It is very strange that any misapprehension should exist in the mind of the Deputy District Justice in regard to his jurisdiction. By Section 1423 of the Civil Code, jurisdiction is conferred upon Police and District Justices, whenever a master shall be found guilty of any cruelty, misuseage or violation of the terms of the contract towards any person bound to service, etc., to examine into, hear and determine the complaint, etc.; and, if the complaint is sustained, to discharge the laborer from all obligations of service, and he has power to punish the master by fine, etc.

Section 915 of the Civil Code gives jurisdiction to District Justices to hear and determine all civil cases whenever the amount in controversy, or the amount of plaintiff's demand, does not exceed \$100, etc. This was amended by the Act of July 13, 1874, which merely increased the limit of jurisdiction to \$200. This law, which has proved a stumbling-block to the respondent, does not conflict with the law conferring special jurisdiction on District Justices to try the cases of complaints against employers of labor on the part of their bound servants. The two laws are upon different subjects. The two jurisdictions exist concurrently.

I can hardly conceive how any lawyer could make such a point, or any justice entertain such a view of so plain a law. As regards the other point, that a civil suit for wages is still pending between the same parties, this is no bar to the suit to cancel the contract. Arrears of wages might be recovered even after a labor contract was annulled.

I deem the cause shown to be insufficient, and a peremptory mandate may issue to the said respondent to proceed to hear and determine the complaint of the said petitioner, Nakamura Munataro against the said W. H. Purvis, his master, giving

reasonable notice to both parties, and to pay the costs of these proceedings.

K. Katsura, for petitioner.

Honolulu, March 23, 1887.

H. HACKFELD & CO. *vs.* C. KAVANAGH *et al.*

ASSUMPSIT. BEFORE BICKERTON, J.

MARCH, 1887.

Process of garnishment against W., who was out of the Kingdom, was served on his attorney in fact: held, not a proper service.

DECISION OF BICKERTON, J.

This is an action of assumpsit returnable at January Term, 1887, on which there was a confession of judgment by defendant, filed January 8, 1887. The question now before me is: Has there been proper and legal service on the garnishees Trousseau and Wiseman? Plaintiff's counsel consents to Dr. Trousseau being discharged, which disposes of the question as regards him. It appears that this action was brought on December 26, 1886, and that J. E. Wiseman left Honolulu on December the 18th, 1886, for San Francisco temporarily, having had prior thereto a usual place of abode in Honolulu. That J. H. Fisher was constituted the attorney-in-fact of Wiseman during his absence. That on December 26, 1886, service of process was made on Fisher as attorney or agent of Wiseman. Also, that the places of business and abode of Fisher are both entirely separate and different from those of Wiseman.

It is claimed on behalf of Wiseman that he should be discharged as garnishee for the reasons that no legal service of process has been made on him; also, that no true copy has been served. It is claimed on behalf of plaintiffs that service on Fisher, attorney or agent of Wiseman, was legal service on Wiseman.

In garnishment, the Hawaiian Statute provides that service on garnishee shall be made by leaving a true and attested copy with the garnishee, or at his usual place of abode, and that the summons and directions shall be signed and issued in the same manner as summonses are usually in civil actions, and shall be served by the officer according to such direction. Comp. Laws, p. 280.

"The attaching creditor furnishes the names of the persons to be garnisheed, and the sheriff proceeds to execute the writ without any unusual formality; but he must conform to the statute." Waples on Attachment and Garnishment, p. 193.

This service was made on the attorney or agent of the attorney or agent (garnishee). Parker, C.J., says: "It is no answer to say that this service was more likely to give notice than the other on account of long absence of the defendant from the commonwealth. The Legislature is to judge of this; it having prescribed the kind of service, none other will avail." *Peck vs. Warren*, 8 Pick., 164.

After hearing argument and viewing the authorities cited by counsel, together with others, I am of opinion that there was no legal service on Wiseman, and Wiseman is discharged as garnishee without further answer.

L. A. Thurston, for plaintiffs.

Whiting & Creighton, for garnishees.

Honolulu, March 25, 1887.

L. ALUNA *vs.* S. SELIG. Receiver.

YEONG SAI KONG *vs.* S. SELIG, Receiver.

IN EQUITY. BEFORE JUDD, C.J.

MARCH, 1887.

A release by a creditor to the administrator of a deceased partner, held to bar a further claim by the creditor against the firm.

The manager of a partnership held entitled to wages from the receiver.

DECISION OF JUDD, C.J.

The above named cases are, by agreement, heard together. One Ahuna, a Chinaman, who was doing business as a trader and rice planter by himself in the district of Waialua, Oahu, and also with one Y. Anin as a rice planter at Mokuleia, in Waialua, under the name of Anin & Ahuna, died intestate on the 7th January, 1886. S. Selig was appointed administrator of his estate in February, and was appointed receiver of the partnership of Anin & Ahuna on March 29th. Soon after his appointment as administrator, Mr. Selig went to Waialua with Anin to examine the papers of Ahuna, deceased, and ascertain the state of the accounts. Through Lau Cheong, the deceased's bookkeeper, an abstract from the books kept in Chinese characters, some 100 in number, was obtained. This abstract presented to the Court does not contain the account of either plaintiff. The respondent proceeded to settle the estate and wind up the partnership. Aluna (plaintiff) returned from China soon after, and early in 1886 presented a claim for some \$8000, and brought a suit therefor at the July term, which the administrator, finding proof that some \$2000 was really owing Aluna, settled for the sum of \$3000, taking from him a release, which will be considered later on. In November, 1885, Aluna presented the claim now sued upon, being for wages as overseer or manager of the rice plantation at Mokuleia, owned by Anin

& Ahuna, at \$500 per annum from 1st July, 1882, to 12th March, 1885, which, after deducting sums received from time to time, amounts to \$1054.75.

The other plaintiff, Yeong Sai Kong, presented a claim covering the same period for wages as manager and bookkeeper for \$500 per annum, which, deducting the sums received by him, amounts to \$1,077.85. It is remarkable that, although Mr. Selig was calling for claims not only against the estate of Ahuna, but against the partnership, the claim of Yeong Sai Kong was not presented to him while at Waialua, and no suggestion was made to him of the existence of either of them by Anin the surviving partner, or the bookkeepers, or by anyone. Anin now says they are just claims, and ought to be paid, and that he informed Mr. Selig of them at Waialua. I do not believe this. The bookkeeper (Lau Cheong) says they do not appear in Ahuna's books, though there was an entry of the time they began to be employed, and of the charges against them, but that he was never told what wages, if any, they were to receive, and made no credit to them. The plantations on which they were employed were sold on credit in March, 1885, and went into other hands; but it is clear that no settlement was made of the demand of these plaintiffs for their labor on this plantation. Aluna was Ahuna's brother. Yeong Sai Kong is Anin's cousin, and I think they were employed by the respective partners to look after their respective interests—probably under an understanding that each was to receive from his relative a share in the profits, if it was profitable, or in the amount it sold for when realized upon. This is the most rational way of explaining their silence. But there is no legal proof of this.

The facts remain undisputed that they performed the labor as claimed, and that they have not been specifically paid for it. I do not think the testimony that the stated accounts were presented to Ahuna and approved by him, and passed on to Anin and by him approved, and then passed back to the plaintiffs, is reliable. It is inconsistent with the conduct of plaintiffs as well as that of both Anin and Ahuna. But if the contracts to pay

\$500 per annum be not substantiated, I think there is evidence enough that the services were well worth these wages. This case seems to me to be an attempt on the part of these Chinese to prove a good claim by manufactured documentary evidence. But it is urged by respondent's counsel that the release executed by Aluna is an effectual bar to his present claim. It is as follows:

"In consideration of three thousand dollars to be paid to me by S. Selig, administrator of the estate of L. Ahuna within ten days, I do hereby release and discharge the said administrator and estate of and from any and all claims, demands and charges which I or my wife may have against the said administrator or estate from the beginning of the world to date. And I do hereby assign and deliver to the said Selig all notes, debts, choses in action and property, the subject matter of a suit between myself and Selig, which suit is hereby settled and satisfied by these presents. This receipt is in satisfaction of every claim of mine against said estate, equitable or otherwise.

"(Signed) In Chinese Characters.

"Witnesses: W. A. Kinney, Rich. F. Bickerton.

"Acknowledged at Waialua, Oahu, July 7, 1886."

This release is a satisfaction of every claim of Aluna's against the estate of Ahuna. It would have no different effect if it were made to Ahuna in his lifetime. Now, by the authorities, a partnership debt is, in the consideration of equity, several as well as joint. Collyer Partnership, Sec. 580; Story Partnership, Sec. 362.

"A release between the creditor and one partner will inure to the benefit of the firm." Collyer, Secs. 606 and 752.

Wilde, J., in *Goodman vs. Smith*, 18 Pick., 416, says: "It is a well established principle that an actual release to one of two joint and several obligors or promisors is a discharge of the debt, and consequently may be pleaded in bar by both of the obligors or promisors; but it is otherwise as regards a covenant to one obligor not to sue." See also *Averill vs. Lyman*, 18 Pick., 351.

The only authority I can find against this view is from 7 Watts & Serg., 317, where the law is stated to be that "a release of all actions and causes of action against J. S. is not a release of a cause of action against a firm of which J. S. is a member." We have not this report, and I can only say that it is not in accord with the current of authorities cited by the text writers.

It is not to the credit of Aluna that he withheld knowledge of this claim from Selig when treating with him for settlement of his claims against Ahuna's estate. General words of release are to be construed most strongly against the releasor, and I am of the opinion that the release pleaded is an effectual bar to the claim of Aluna, and will decree accordingly, dismissing him with costs.

As to Yeong Sai Kong, he may have a decree against the respondent for the amount claimed, with costs.

Creighton, Hatch and Dare, for plaintiffs.

S. B. Dole, for respondent.

Honolulu, March 25, 1887.

In re AH MOOK & CHOCK HIN.

HABEAS CORPUS. BEFORE PRESTON, J.

MAY, 1887.

Defendants in the Police Court were charged with gaming, and convicted of having gambling implements in possession contrary to Chap. 41, §5, Laws of 1886.

Held, the conviction was illegal: the prisoners should have been discharged for gaming, and might then have been recharged with the other offense.

DECISION OF PRESTON, J.

In this case I granted a writ of *habeas corpus* for the above

named Ah Mook and Chock Hin on the allegations in a petition presented by one Akai, that the above-named persons were detained by the Marshal in the Oahu prison unlawfully, under an alleged conviction for gaming.

The prisoners were brought before me and a return was filed by the Marshal, averring that the prisoners were lawfully in his custody by virtue of a judgment of the Police Court of Honolulu, dated the 18th March last, adjudging the prisoners, together with one Lu Choy, guilty of violating Section 5, Chapter 41 of the Session Laws of 1886, and of the mittimus issued thereunder.

This return was traversed.

It appears from the records that the prisoners and two other persons were charged before the Police Court with "Gaming at Chee Fa at Honolulu, on the 14th instant," and that after a motion to dismiss the complaint was made by counsel on behalf of said prisoners and one of the other parties charged, a *nolle prosequi* having been entered against the fourth man, on the ground that there was no evidence to support the charge of gaming, and which was overruled, the Magistrate convicted the prisoners of violating "Section 5, Chapter 41, Laws of 1886," and sentenced them to pay a fine of \$75 each and costs.

The prisoners were arrested in default of payment of the fine.

I am of opinion that this conviction is illegal. The defendants were not charged under the law of 1886, which provides a punishment against persons having in their possession unlawfully any * * * ticket used or which can be used in any lottery * * * . This is a separate and distinct act from the Chapter in the Penal Code relating to gaming, and which offense is therein defined.

The prisoners were not guilty of the offense with which they were charged, and should have been dismissed. They might then have been recharged with the proper offense, to which they could have made their defense, if any they had.

From the manner in which the case was decided, they were deprived of their legal right to make a defense, and their con-

viction thus being void they must be discharged, and it is so ordered.

W. R. Castle, for relator.

A. P. Peterson, for the Crown.

Honolulu, May 4th, 1887.

W. C. PARKE, Assignee *vs.* M. P. ROBINSON *et al.*

TROVER. BEFORE PRESTON, J.

AUGUST, 1887.

A tenant holding over after end of term, failed to pay rent, and the landlord distrained and removed goods, prior to the bankruptcy of the tenant: Held, the landlord was entitled to the proceeds as against the assignee in bankruptcy.

DECISION OF PRESTON, J.

This is an action of trover brought to recover certain stock-in-trade, consisting of crockery, glassware, etc., belonging to the bankrupt, or its value.

It appeared from the evidence that on the 1st day of April, 1864, Messrs. James Robinson and Robert Lawrence granted a lease of a store situate at the corner of Nuuanu and King streets, Honolulu, to T. & T. J. Mossman, for the term of three years from date, "with the privilege of holding the same three additional years," at the yearly rent of \$1030, payable quarterly. That at the expiration of said term, no other lease or agreement was made, and the tenants and the survivor (T. J. Mossman) remained in possession of the premises, paying the same rent as reserved by the lease, until the bankruptcy of the said T. J. Mossman, which occurred on the 24th day of January, 1887, on which day the defendants, who had become the owners of the premises, distrained and removed the goods in question for one year's rent due on the 1st day of the said month.

The plaintiff was appointed assignee of the bankrupt's estate, and claimed that the distress was illegal.

On behalf of the plaintiff it was contended that at the expiration of the term created by the lease, the lessees continued in possession as tenants at will only, and therefore, under the statute relating to distress for rent, the defendants had no right to distrain, or at most for four months' rent only.

I am of opinion that the defendants are entitled to judgment.

The lessees on the expiration of the term became tenants from year to year, subject to the tenancy being determined by proper notice.

The statute allowing a distress for rent does not limit the right to any definite time or to any express amount. It provides that no goods shall be liable to be taken on execution, unless the party suing out the same shall pay all arrears of rent, provided the same shall not exceed one year, if the tenancy be by the year, or four weekly or monthly payments if the tenancy shall be by the week or month.

This provision cannot apply in this case.

The defendants having distrained and removed the goods before the order to the Marshal to take possession was made, are entitled to hold the proceeds, and I therefore find for the defendants and direct judgment to be entered for them with costs as of the July Term.

Cecil Brown, for plaintiff.

W. Kinney, for defendants.

August 10, 1887.

H. KAILI *vs.* INSPECTORS OF ELECTION FOR HONOLULU.

MANDAMUS. BEFORE PRESTON, J.

AUGUST, 1877.

The Court may, by mandamus, compel Inspectors of Election to place a voter's name on the list.

In a petition by a voter for mandamus against the Inspectors, he must state his title to the right claimed.

Application for an extraordinary remedy must be perfect in the first instance, and amendments cannot be allowed.

DECISION OF PRESTON, J.

This is an application by Henry Kaili, a native Hawaiian and a resident of Honolulu, for a peremptory writ of mandamus to Jonathan Austin, L. C. Abels, M. D. Monsarrat, F. Wundenberg and H. S. Kila, the Board of Inspectors of Elections designated to register voters for nobles for the District of Honolulu, commanding them to enroll upon the register of voters for nobles in said district the name of the petitioner.

The petitioner alleges the appointment of the respondents under and by virtue of the provisions of the Constitution promulgated by the King on the 7th day of July last. That the petitioner, on the 12th day of August, took the oath required by law for registration as a voter for representatives, and on said day duly registered as a voter for representatives to the Legislature of the Kingdom, and received a certificate of such registration signed by W. Unger, one of the duly appointed Inspectors of Elections for registering of voters for representatives aforesaid, in the Fifth Ward, District of Honolulu. That on the 12th day of August the petitioner presented to the respondents said certificate of registration, and requested to be duly enrolled as a voter for nobles, but though the petitioner, on oath, said he had received the prescribed income for the prescribed time required by law as a qualification to vote for

nobles, the respondents refused to so enroll him for the reason, as petitioner was informed and believes, that they said that they did not believe the petitioner, and for no other reason. That petitioner for the year last past, and for a longer time, had received an income or wage of \$600 per annum.

The Attorney-General showed cause on the following grounds:

1. That the application was premature—the obligation to register petitioner as requested, if any such obligation from the law in this behalf, had not yet matured.

2. That the petition does not allege the petitioner to have stated to respondents, or to have possessed, all the qualifications of a voter for nobles entitled to registration as such by respondents as a Board of Inspectors of Elections.

3. That the granting of the writ would be an unwarrantable interference by the Court with the just exercise of the functions by law confided to respondents as such Board of Inspectors of Elections, they being, in their capacity of such Inspectors, judicial or quasi-judicial officers, the exercise of whose judgment and discretion cannot be controlled or covered by judicial decrees or orders.

4. That respondents were justified in refusing to register petitioner upon the allegations as made by said petitioner to respondents.

The provisions of the Constitution respecting the qualifications of voters for Nobles are as follows:

Article 59: "Every male resident of the Hawaiian Islands, of Hawaiian, American or European birth or descent, who shall have attained the age of twenty years, and shall have paid his taxes, and shall have caused his name to be entered on the list of voters for Nobles for his district, shall be an elector of Nobles, and shall be entitled to vote at any election of Nobles, provided:

First. That he shall have resided in the country not less than three years, and in the district in which he offers to vote not less than three months immediately preceding the election at which he offers to vote.

Second. That he shall own and be possessed, in his own right, of taxable property in this country of the value of not less than \$3000 over and above all encumbrances, or shall have actually received an income of not less than \$600 during the year next preceding his registration for such election.

Third. That he shall be able to read and comprehend an ordinary newspaper printed in either the Hawaiian, English or some European language.

Fourth. That he shall have taken an oath to support the Constitution and Laws, such oath to be administered by any person authorized to administer oaths, or by any Inspector of Elections:

Provided, however, that the requirements of a three years' residence and of ability to read and comprehend an ordinary newspaper, printed either in the Hawaiian, English, or some European language, shall not apply to persons residing in the Kingdom at the time of the promulgation of this Constitution, if they shall register and vote at the first election which shall be held under this Constitution."

Article 80 provides that "The Cabinet shall have power to make and publish all necessary rules and regulations for the holding of any election or elections under this Constitution, prior to the passage by the Legislature of appropriate laws for such purpose, and to provide for administering to officials, subjects and residents the oath to support this Constitution."

Pursuant to this power, the Cabinet made and published certain "rules and regulations for administering to officials, subjects and residents the oath to support the Constitution and laws; providing for the registration of voters and for holding elections for Nobles and Representatives."

And the Minister of the Interior, purporting to act under the said power, designated the respondents to be a Board of Inspectors to register voters for Nobles in the District of Honolulu.

The regulations for registering voters for Nobles are as follows:

14. One Board of Inspectors of Election for each election district, which board shall be designated by the Minister of the Interior, shall make out a correct alphabetical list or register of all the persons in the entire election district who may be entitled to vote for Nobles, and who shall apply to such board for such purpose, or whom the said board may find, from satisfactory evidence, to possess the requisite qualifications to vote for Nobles.

15. The chairman of such designated board shall at least twenty days before the day of holding any election for Nobles and Representatives, except as hereinafter provided, make out from such list or register a correct alphabetical list of all the persons qualified to vote for Nobles residing in the precinct or ward for which he is appointed, and cause copies of the same to be posted at the place in such precinct or ward where the election is to be held, and in at least two other public places in such precinct or ward; and at the same time he shall in like manner prepare from such list or register lists of all persons qualified to vote for Nobles residing in the other precincts or wards respectively in such election district, and shall send to each chairman of the Board of Inspectors in such district a copy of the list of persons qualified to vote for Nobles residing in his precinct or ward.

16. The chairman of such Board of Inspectors shall, upon receipt of such list of persons qualified to vote for Nobles residing in his precinct or ward, post three copies of the same in such precinct or ward in the manner above provided for posting lists of electors of Representatives.

17. The Boards of Inspectors designated to prepare lists of voters for Nobles shall hold sessions for correcting or adding to the lists of voters for Nobles, and give notice thereof in like manner as prescribed for the Inspectors of Elections for Representatives.

The regulations for posting lists of voters for Representatives referred to in Regulation 16 are as follows:

8. The Inspectors of Election of each precinct or ward shall

hold at least two sessions of reasonable and sufficient length, at some convenient place in the precinct or ward, not less than ten nor more than twenty days preceding the day of holding an election for Representatives, for the purpose of receiving evidence of the qualifications, and of registering the names of persons who may not have been previously registered by the Inspectors, and who may claim a right to vote, and also for the purpose of correcting, when necessary, said lists.

9. Notice of the time and place of holding such sessions, respectively, shall be given by the Inspectors, upon the alphabetical lists posted as herein provided; and at such sessions any one offering testimony against the right of any person to vote, whose name may appear in the said alphabetical lists, shall be reasonably heard; and if the Inspectors shall be satisfied on such hearing, that the name of such person should not have been placed on the register, they shall at once erase the same therefrom.

Regulation 10 provides: "At the first registration and election of Nobles and Representatives held hereunder, the production of tax receipts as evidence of payment of taxes shall not be required."

On the argument it was contended by the Attorney-General, for the respondents, in support of the first objection, that the Inspectors were not bound to put a voter's name upon the list until twenty days before the election, and therefore the application was premature, and I thought that this contention was correct; but the argument by Mr. Creighton, for the petitioner, induces me to alter my opinion, and I think that the list required by Article 14 should have been made up as the applications to be registered were made. The lists for the different wards, required to be made up twenty days before the election, are to be prepared from the alphabetical list mentioned in Regulation 14.

This regulation provides that the Inspectors "shall make out an alphabetical list of all the persons in the entire district," who may be entitled to vote for Nobles, and who shall apply for such

purpose, or whom the said Board may find from satisfactory evidence to possess the requisite qualifications to vote for Nobles.

The Constitution provides what those qualifications are, and it seems to me that by the regulations the Board of Inspectors may place on the register not only those who apply, but also those whom they may find qualified. And it also seems to me that it is the duty of the board to place upon the register all such persons who may apply for that purpose, and who shall, if required by the board, make oath that they are possessed of the necessary qualifications.

I will, for the present, pass over the second objection and consider the third, which raises a very important question.

It was contended by the Attorney-General that the law, by which I understand is meant the regulations, confers upon the Board of Inspectors a judicial and discretionary power to place upon the register the names of such persons only as the board may consider entitled to vote, and having so decided, however wrong such decision may be, it cannot be reviewed by this Court, and that having in their discretion and as their judgment decided that the petitioner was not qualified, that decision was final.

Many authorities, which it was contended sustained this view, were cited, and in particular, *Freeman vs. Selectmen of New Haven*, 34 Conn., 414. In which case it was held that as the Constitution of that State provided that "the selectmen, and town clerk of the several towns, shall decide on the qualifications of electors at such times and in such manner as may be prescribed by law," the Constitution had made those parties the sole judges of the qualifications of electors, and therefore a writ of mandamus could not issue. I do not think that this decision, or the authorities cited, apply to the case before me.

Our Constitution has no such provision, neither do the regulations contain any such or similar provisions.

I cannot agree with the contention made on behalf of the respondents, that if the Inspectors will not place upon the list the name of a voter properly qualified, and thereby deprive him

of his right to vote, this Court cannot interfere. I think that it is competent for and the duty of the Court to compel the board to insert the name of any person legally qualified to vote, upon the register of voters, on the refusal of the board to do so—by this register I mean the list provided for by Regulation 14.

In the case of *Thompson vs. Montgomery et al.*, Inspectors of Elections for Honolulu, *ante* page 21, Hartwell J. issued a mandamus to compel the board to place the name of the elector upon the register of voters, notwithstanding that the board had held that the elector was not qualified by law, and I would, without hesitation, make a similar order in this case, if I considered the petitioner was properly before the Court, as I am of opinion that the duties of the board in making up the alphabetical list under Regulation 14 are purely ministerial.

If any name is improperly on the list, the regulations provide for a revision and for the striking off such name.

I will now turn to the second objection, which I feel compelled to sustain. I deem it to be absolutely necessary that the petitioner should state in his petition the title of the petitioner to the right claimed; this may be done under a general allegation that the petitioner is legally qualified and entitled to vote for nobles for the district, although it would be much better if the petitioner should state specifically his qualifications. This the petitioner has not done, he has not stated his right generally, neither has he stated that he possesses the qualifications required by the Constitution.

The allegation is that he is a native Hawaiian and a resident of Honolulu, over twenty years of age, that he has taken the oath required by law for registration as a voter for representatives and registered as such in the fifth ward; that he presented such certificate to the respondents and requested to be enrolled as a voter and deposed on oath that he had received the prescribed income for the prescribed time required by law as a qualification to vote for nobles, and that he was in receipt of an income of \$600 per year.

The Constitution requires these qualifications for a voter:

1. That he shall be a male resident of the Hawaiian Islands, of Hawaiian, American or European birth or descent.

2. That he shall have attained the age of twenty years.

3. That he shall have paid his taxes.

4. That he shall have caused his name to be enrolled on the list of voters for Nobles for his district.

5. That he shall have resided in the country not less than three years, and in the district in which he offers to vote not less than three months immediately preceding the election at which he offers to vote.

6. That he shall own and be possessed, in his own right, of taxable property in this country of the value of not less than \$3000 over and above all incumbrances, or shall have actually received an income of not less than \$600 during the year next preceding his registration for such election.

7. That he shall be able to read and comprehend an ordinary newspaper printed in either the Hawaiian, English, or some European language.

8. That he shall have taken an oath to support the Constitution and Laws.

For the purpose of registering and voting at the ensuing election, the three years' residence and the ability to read, etc., do not apply.

But the three months' residence in the district, and the payment of taxes, by which I understand taxes due and payable, are still necessary qualifications.

It will be seen that Regulation 10 only refers to the evidence required as to payment of taxes, and does not, as it could not, dispense with the constitutional requirement.

The petitioner, as will be seen from the foregoing remarks, has not brought himself within the requirements of the law.

He is not deprived of his vote, as he may yet apply for registration, and will, if he proves his qualification to the board, no doubt, be placed upon the revised list.

Counsel for petitioner asked leave to amend, if I should be against him on the second ground, but I do not think it is a case

in which an amendment should be allowed. This is an application for an extraordinary remedy and should have been perfect in the first instance. I cannot, therefore, give leave to amend.

The matter was important and the respondents have been defended by the Government, and I therefore do not award costs against the petitioner.

The petition is dismissed.

C. Creighton, for petitioner.

C. W. Ashford, Attorney-General, for respondent.

August 26th, 1887.

OSCAR UNNA *vs.* C. BROWN *et al.*, Executors.

J. H. HENDERSON *et al.* *vs.* W. F. ALLEN, Receiver, *et al.*

IN EQUITY. BEFORE JUDD, C.J.

OCTOBER, 1887.

A receiver, appointed to carry on a sugar plantation upon which there were outstanding mortgages, held to have a prior lien upon receipts of the plantation, but not upon the *corpus* of the property as against the mortgagees.

DECISION OF JUDD, C.J.

The first matter is a motion by M. S. Grinbaum & Co., setting forth that on the appointment of W. F. Allen, Esq., as Receiver of the Hana Plantation, on the 5th of August, 1885, they made an agreement to make advances to him for the purpose of keeping up said plantation while in his hands as receiver, in accordance with the authority given him by the Court to make contracts for obtaining money for said purpose; that in pursuance of said contract and of orders made by the Court from time to time, they have advanced to said receiver from the 5th day of August, 1885, to the 13th day of April, 1887, the sum of \$169,826.95, including interest, and have received from proceeds of crops the sum of \$141,728.78, leaving a balance of \$28,098.17 due the petitioners on the 13th April, 1887; that

these advances were made to the receiver solely upon the faith and credit of the orders of the Court, and in confidence that the Court would see to the payment of the same; that the advances have been made for the payment of the allowances made by this Court to the receiver and to the widow and child of August Unna deceased, to the payment of interest upon mortgage debts, for the general purposes of the plantation and taxes, and all for the preservation of said property.

That since April 13th, 1887, the petitioners have made certain advances to the receiver in pursuance of an order made in the case of *Henderson et al. vs. Allen et al.*; that said partnership of August and O. Unna is also indebted to petitioners in the further sum of \$73,924.93, for advances made to them prior to the appointment of the receiver; that the petitioners had declined to make further advances to them, having no security.

They pray that in addition to the sum to be allowed them for advances since April 13, 1887, on the order made in the suit of *Henderson et al. vs. Allen et al.*, they may be allowed the said sum of \$28,098.17, and that the same may be paid from the funds (the proceeds of the sale of the plantation) before the payment of any mortgage liens, and also that the receiver may be directed to sell all of the individual property of said partners and apply the same, after paying individual debts, to claims against said partnership.

The following is a statement of the essential facts of this case:

Mr. August Unna, the principal owner of the Hana Plantation, died in April, 1885, leaving a will appointing Cecil Brown, Dr. R. McKibbin and Maria B. Unna (deceased's widow), executors and executrix, which will was admitted to probate. There were three mortgages then existing upon the plantation, the first for \$25,000, held by the Hawaiian Investment and Agency Company, the second for \$25,000, held by J. H. Henderson and others, and the third for \$25,000, held by Elizabeth Anthon and others.

In July, 1885, Oscar Unna, the surviving partner of A. Unna deceased, and part owner of the Hana Plantation, filed a bill in

equity to wind up the partnership and for the appointment of a receiver. It set forth the death of A. Unna, that he left a widow and a child named Elsie, the making and probate of the will; that there were mortgages upon the property amounting to \$75,000; that \$70,000 and over was then owing to M. S. Grinbaum & Co., factors and agents of the plantation; that there are no moneys of the deceased or of the partnership wherewith to pay said debts or the interest on the mortgages; and that a sale of the plantation could not then be made without great sacrifice of value.

That the executors and executrix are not authorized by the will to raise moneys by mortgage upon the property of the testator or upon the property or otherwise for the carrying on of the plantation, and the petitioner is unable to raise money therefor. The bill prayed for an account to be taken of all moneys owing by said partnership; that the assets of the firm and of the separate property of the deceased be marshaled, and that a receiver and manager be appointed to take charge of and carry on the plantation business until the same can properly be wound up, and the said debts paid out of the profits of said business or from the proceeds to arise from sale of said property when the same can be made without sacrifice, with power in such receiver to pay all rents, taxes, expenses in respect to the property and in carrying on the said business, and for that purpose to pay both employees and agents as may be required, and to sell the sugars and collect all moneys due or to be due to the partnership business, to pay the interest on the mortgages and all other debts now owing or which shall be incurred in respect of said business and plantation, and also to raise money to pay to defendants for the use of said widow and child until the final winding up of said business, etc.

The executors, Brown and McKibbin, and Mrs. Unna, executrix, were made parties defendant, and they answered, in the main admitting the allegations and consenting to the appointment of a receiver.

The mortgagees were not made parties to the bill, nor

did they appear at any stage of these proceedings. The attorney for the petitioner, Oscar Unna, also appeared for Messrs. Grinbaum & Co., unsecured creditors. It was stated to the Court that a forced sale of the plantation would be damaging to the interests of the parties interested, and that the property of the plantation was amply sufficient for the payment of the mortgages. Whereupon the Court appointed W. F. Allen receiver, under a bond of \$10,000, with a salary of \$75 per month, to report quarterly; and among other things, the order authorized the receiver to make such contracts as he may deem proper for obtaining money to be advanced for carrying on said plantation, including the usual and necessary outlays thereon for labor, salaries, rents, taxes and otherwise, and for the sale of the sugars to be made thereon, but no unusual outlays for improvements or otherwise upon said property, exceeding in any one item the sum of \$500, shall be made without the express approval of this Court, etc.

The receiver made an arrangement with Messrs. Grinbaum & Co., the former agents, to continue their agency of the plantation and make advances at 4½ per cent. commission and 9 per cent. interest.

Contrary to expectation the plantation has run behind, owing to the low price of sugar and certain defects in the plant.

On the 12th April, 1887, the holders of the second mortgage, Henderson and others, filed a bill to foreclose their mortgage, and an order was made on the 13th April, directing summons to be served upon parties, returnable on the 29th July, and further that "all advances and sums of money which may be made to Mr. W. F. Allen, the receiver of this Court, now in charge of the premises described in the said bill, and all sums which may be expended by him in keeping up said plantation and preserving the crops of the same, and in planting such new crops as good husbandry may require, until a sale of said property is had under the order of this Court, shall constitute a first lien upon said premises, and shall be paid out of the first moneys realized upon any sale of said premises."

The proceedings in foreclosure went along in the usual way, and the plantation was sold on the 5th September for the sum of \$103,000, Messrs. Grinbaum & Co. being the purchasers. This amount not being much more than sufficient to discharge the principal and interest of the three mortgages, as well as the receiver's expenses since the order on the bill for foreclosure, 13th April, 1887, the important and difficult question arises on the motion of Grinbaum & Co., whether the balance of account for running the plantation from the appointment of the receiver, August 5th, 1885, to the order in foreclosure, should be given priority over the mortgages as a first lien.

The mortgagees do not object to the balance of the receiver's account since April 13, 1887, being paid in full before the mortgages are discharged, and this account may be referred to a master.

The first and third mortgagees strenuously oppose the allowance of the receiver's account from the 5th August, 1885, to 13th April, 1887, as a preferred claim. The second mortgagees, Henderson *et al.*, are protected by endorsement, and say nothing.

It is urged on behalf of these mortgagees, that not having been made parties to the original bill, which prayed for the appointment of a receiver, the Court is now without jurisdiction to create a lien which shall have priority over their liens.

The general jurisdiction of the Court to appoint a receiver of partnership property upon the death of a partner, on a proper showing of the necessity for it, is not questioned. Nor is it questioned by the mortgagees that the peculiar circumstances of this case, of a sugar plantation owned by a partnership, on one partner dying, the surviving partner and the executors not having funds, and not being willing to assume the responsibility of carrying it on, would justify the appointment of a receiver in the interests of the devisees and of the unsecured creditors.

A sugar estate, when once it has stopped operations, has but little value over the value of the separate items of property composing it. Its value consists in what it can produce, and if it is

suffered to lie idle, and crops are not kept in cultivation, and preparation for successive crops neglected, it depreciates most rapidly.

The necessity of keeping the work of a sugar plantation moving is as essential to its preservation as productive property as a railroad, with this difference only: that the public right to have a railroad kept up for its convenience does not exist in the case of a plantation.

In August, 1885, the only alternative was an immediate sale by the executors, with the consent of the mortgagees, or the appointment of a receiver, to run it until it could be wound up and its debts paid from the profits, or eventually sold to advantage.

What was the object, then, of the receivership in this case? None of the mortgagees had taken possession. Their mortgages were not due, and they were content with their security. I can come to no other conclusion than this: that the object of the receivership was to enable the unsecured creditors and the heirs to have the plantation worked so as to pay the creditors and save something for the heirs.

The mortgagees did not fear that the security would prove insufficient, or that the mortgagors were insolvent, which are the grounds upon which a receiver may be appointed in aid of a mortgagee; they took no steps to have a receiver appointed, relying entirely upon their security. I do not think it is an answer to say that as they were benefited by the plantation being continued in operation for two years, they should admit the lien for the expenses for running the same to a priority over their own liens.

If the plantation had been stopped for want of funds, they undoubtedly would have either taken possession or have applied for a receiver. But if they were sure of their money in 1885, they are in no better position in 1887. I think the extent of the lien which the receiver's disbursements had was over the receipts alone, and not over the *corpus* of the estate.

The advantage of this receivership to the unsecured creditors (M. S. Grinbaum & Co.) is manifest. It afforded an opportunity

to ascertain by actual trial whether the plantation could be worked out of debt, and they made the advances, since they were to take all the profits of what their expenditures, through the receiver, produced. Of this the mortgagees did not and could not well complain, as their interest was paid.

Upon a review of the whole case, I think that it was not contemplated that any excess of expenditure over receipts was to be recoverable out of the *corpus* of the estate over the mortgages. Certainly the order appointing the receiver did not so read, and there was nothing on the record to apprise the mortgagees that their liens were liable to be defeated by the contingency of the plantation under the receiver running behindhand.

Why, then, were the expenditures to be made by the receiver subjected to the scrutiny and allowance by the Court? He was not allowed to make any unusual outlay over \$500 in amount without the express sanction of the Court. It was, in my opinion, in order to protect the interests of the devisees of A. Unna, deceased, and to prevent unnecessary and excessive outlays which would postpone their getting anything until these were paid. I am fully impressed with the weight of the reasons which are urged against the view I have taken, to wit: that the petitioners, M. S. Grinbaum & Co., were justified in giving full faith and credit to the receiver and to the order of the Court appointing him; that the authority to borrow money for advances implies the understanding to see it paid, etc.

I think it can be drawn from all the cases cited that those who take receiver's certificates, or, as in this case, advance money to the receiver, do so subject to the rights of the parties who have prior liens upon the property, and who have not, but should have, been brought into Court if their rights were to be affected. There may be exceptional cases when a Court will deem it necessary to charge the property over the prior liens, with a receiver's lien in advance of the parties who hold these prior liens being brought into Court, and the Court will then have to consider whether it is equitable to make such a superior charge upon the property. But I do not find that the case before me is of such a nature.

Declining to hold that the advances to the receiver, from 5th August, 1885, to 13th April, 1887, are a first charge upon the property, no reference of this account is necessary.

As above stated, the account from the 13th April, 1887, to day of sale of the plantation, may be referred to a master to be agreed upon by the parties; or, if they cannot agree upon one, I will appoint one, and I will make such directions to him as they may be applied for from time to time.

The authorities cited by petitioners are: *Wabash W. L. and P. R. R. vs. Central Trust Co.*, 22 Fed. Rep., 271; *High on Receivers*, Sec. 394, B. and C., 472; *Blair vs. St. Louis R. R.*, 22 Fed. Rep., 472; *Central Trust Co. vs. Wabash R. R.*, 22 Fed. Rep., 868; *Kerr on Receivers*; *Building Association vs. Sup. Ch.*, 60 Cal., 223; *Gibson vs. Martin*, 8 Paige, 481; *Miltenberger vs. R. R.*, 106 U. S., 286; *Hervey vs. Ill. Midland R. R.*, 28 Fed. Rep., 176; *Fosdick vs. Schall*, 99 U. S., 235.

For the mortgagees: *High on Receivers*, Secs. 17, 84, 290, 111, 112, 682, 683, 685, 688, 495; 32 Ill., 79; 41 Conn.; 28 Fed. R., 176; *Kerr's Inj.*, 50, 51, 52, 54, 55, 56, 58 and 73.

In the case of *Henderson vs. Allen*, I order the distribution of the fund as follows: First, to the payment of the receiver's account from 13th April, 1887, to day of sale, and then the mortgages with interest, according to their priority. As the fund is sufficient to pay all, I see no reason why the mortgages may not be paid in full, without waiting for the master's report. The receiver is directed to realize upon the individual estate of of the partners, and to wind up the partnership in accordance with the law.

Decree accordingly.

F. M. Hatch and *S. B. Dole*, for petitioners, *M. S. Grinbaum & Co.*

W. O. Smith and *W. A. Kinney*, for first and third mortgagees.

Cecil Brown, for executors of the will of August Unna, deceased.

W. Foster (guardian *ad litem*), for Elsie Unna.

Honolulu, October 15, 1887.

THE KING *vs.* W. S. LUCE.

BEFORE JUDD, C.J., AS COMMITTING MAGISTRATE.

MARCH, 1888.

The prosecution cannot, by search warrant, compel the production of the books of account of a defendant, to be used as evidence against him.

DECISION OF JUDD, C.J.

The case, stated briefly, is this: A search warrant was issued by me on the affidavit of the Attorney-General, the object of which was to procure the books of account of the accused, with the purpose of using them as evidence of certain transactions which it is alleged will show a conspiracy between the accused and another to defraud the Hawaiian Government of duties on imported liquors.

I think a cursory reading of the statute defining and authorizing the writ of search warrant, Chapter XLVIII. of the Penal Code, would give the impression that it could legally be used for such a purpose.

Section 3 of the Act defines the purposes for which this warrant can be granted, and among them is this: "To discover articles necessary to be produced as evidence or otherwise on the trial of anyone accused of a criminal offense": and it might be said that as the books of the accused are "articles," and are deemed "necessary to be used as evidence," the statute applies.

After hearing argument, and having taken time to reflect upon it, I have come to the opposite conclusion. I think the true meaning of this clause in the statute is that in order to authorize the seizure of "articles to be used as evidence," the "articles" themselves should be evidence: that is, that they should form a part of the *corpus delicti*; as, for example, the weapon by which a homicide was committed, or the bloody clothing worn by the victim of an assassin, etc., these forming a class of articles distinct from those the bare possession of which is criminal—as, for example, the implements and material for making counterfeit coin.

The mere possession of a weapon which could produce death is not criminal; but if such a weapon has been used as the instrument by which a murder was effected, and it is necessary that it be used as evidence on the trial of the person accused of this murder, a search warrant can issue to obtain it.

But in the case before me the books of account as "articles"—that is, as material objects or chattels—are not evidence to be used. They are desired by the prosecution for the records they contain, that is, for the entries of certain transactions, which will have to be testified to and read in order to be evidence.

These transactions, if they have occurred, could be testified to by witnesses to the transactions even if not recorded. The books of account are merely succinct registers of the transactions themselves. In this view, I am of the opinion that the search warrant was improvidently issued.

There is much force in the argument made by counsel for the defendants that Section 2, defining "search warrant" limits this process to the searching for articles illegally obtained or detained, or which are kept for the purpose of using them illegally.

I think, however, that this section is a mere definition, and that a warrant might issue to obtain an article necessary to be produced as evidence against a third party from the possession of one who is not the party accused.

It may be said that the withholding from the prosecution of such an article is illegal—that is, it is an offense against the law. But from such an examination of our Penal Code as I have been able to make, I cannot find that such an act would be punishable, and I am not willing to say that a search warrant could not be applied to such a purpose, for otherwise an offender could deposit with his friends the indicia of his guilt, and they be protected in these acts. In such case the examination to be made by the magistrate of the person in whose possession such articles are found would be for an explanation as to how they came into his possession.

A further objection is made to the search warrant, in that it

does not order the arrest of the person in whose possession these articles should be found. I think this is sufficiently complied with by the warrant of arrest, which was issued contemporaneously.

Having found that the statute which is invoked for the issuing of this search warrant does not authorize its use for the particular purpose for which it was asked, it is unnecessary for me to decide whether it is inhibited by the 9th article of the Constitution, which prescribes that no one shall be compelled, in any criminal case, to be a witness against himself. I merely remark that I am still of the opinion that where a Constitutional question is raised, if the Justice before whom it is raised has grave reasons for believing that the procedure or act in question is forbidden by the Constitution, he should reserve the question for the consideration of the Court, otherwise serious rights of the Government might be lost, as the prosecution cannot appeal.

There remains to be determined the question of practice, as to whether I am authorized to quash the search warrant in advance of the articles, for the production of which it was issued, being offered in evidence against the accused.

It is to me a novel request, and no precedent for it is shown by defendant's counsel. It is certainly unprecedented to ask the Court, when the accused has not been brought before it, that a process of the Court, which is ancillary to the proceeding against him, should be quashed.

In the cases I have had access to, viz., *U. S. vs. Boyd*, 116 U. S., 616, the Court held that the inspection by the District Attorney of the books of the accused, which was a compulsory production by him of evidence against himself, and "the admission in evidence," were erroneous and unconstitutional proceedings.

So in *Commonwealth vs. Dana*, 2 Metcalf, 333, the search warrant was offered in evidence by the prosecution, "to the admission of which the defendants' counsel objected, on the ground that the same had been issued improvidently, and was void in law," and the Court first proceeds to discuss the question,

whether the search for lottery tickets, the possession of which, with the intent to sell them, was a violation of law, was such a "reasonable search" as was authorized by the Bill of Rights.

I still think that the motion was premature, and though I allowed argument on the main question as to whether the search warrant was authorized, before this motion was decided, I did so for the convenience of myself, as well as of counsel. I do not hold it correct practice to ask the Court to vacate its process before the defendant is before the Court, and before the evidence, which is urged to have been illegally obtained, is offered.

I think that although there is much authority for the position that when papers are offered in evidence the Court can take no notice how they were obtained, whether lawfully or unlawfully, nor would it form a collateral issue to determine that question, the later cases are against this view, viz.: The case cited from 116 U. S., and the recent Anarchist Case, *Spies vs. People of the State of Illinois*, where the Court contemplate that objections should be taken at the trial when the evidence is offered.

I think the examination must proceed, and having reached the conclusion that the books of account procured by the search warrant cannot be received in evidence, I will order them back to the possession of the defendants, if offered in evidence; and if not offered, will make the same order at the conclusion of this examination.

The Attorney-General and A. P. Peterson, for prosecution.

A. S. Hartwell, F. M. Hatch and W. A. Whiting, for defendants.

Honolulu, March 15, 1888.

SEE HOP & CO. *vs.* W. C. PARKE, Assignee.

IN EQUITY. BEFORE DOLE, J.

MARCH, 1888.

A Court of Equity can only interfere with a judgment at law where the complainant has an equitable defense of which he could not avail himself at law; or had a good defense at law, of which he could not avail himself, owing to fraud or accident, without his negligence.

DECISION OF DOLE, J.

This is a bill in equity praying for a writ of injunction to the defendant to prevent him from taking measures to collect a judgment of \$236.90 entered in the case at law of W. C. Parke, Assignee in bankruptcy of Afu, *vs.* Ami & Y. Alau, co-partners under the name of See Hop & Company, on the 9th day of May, A.D., 1887, and for a hearing and adjudication of the plaintiffs' claim of set-off against the same. The defendant has demurred to the bill for want of equity, and *res adjudicata*.

The main points of the case are as follows:

Afu owed a considerable amount of money to plaintiffs, and failing to pay the same when due, a new arrangement was entered into between them on the 1st day of May, A.D., 1886, whereby the plaintiffs made an additional loan and received a mortgage of all of Afu's property, securing them for their aggregate loans and interest. On the 17th day of June, A.D., 1887, Afu paid to plaintiffs out of realizations from his store business, \$236.90 on account of his said debt. On the 28th day of June, A.D., 1886, Afu was decreed a bankrupt, and the defendant was duly elected his assignee. On the 8th day of March, A.D., 1887, the defendant brought his action of assumpsit against the plaintiffs to collect the said amount of \$236.90. Jury was waived by agreement of parties and the case was heard by Mr. Justice McCully upon an agreed statement of facts in which the issue was stated as follows: "The question is, Can the plaintiff recover in view of the foregoing facts, upon the pleadings herein,

or whether defendants shall take judgment upon their set-off or counter claim herein?" The claim of set-off was one of the pleadings in the case, and as computed left a balance in favor of See Hop & Company of \$1072.65.

Mr. Justice McCully filed his decision on the 7th day of May, A.D., 1887, for the plaintiff in that case, W. C. Parke, assignee; and says in opening: "This case is submitted to the Court, the jury being waived, on an agreed statement of facts. Upon consideration of them, and of the records referred to, I think judgment should be for the plaintiff." (See Appendix, *Parke vs. See Hop.*)

A Court of Equity may only interfere with a judgment at law where "the complainant has an equitable defense of which he could not avail himself at law because it did not amount to a legal defense, or had a good defense at law which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents." *Hendrickson vs. Hinckley*, 17 How., 443.

The plaintiffs' counsel admits that if, as a matter-of-fact and law, the claim of set-off has been adjudicated, his clients have no standing in Court. But the law of the case, as will be seen by the above statement of principles, extends farther than this.

In the former case See Hop & Company had their election to set-off their claim or bring it in a separate action, and they adopted the former method. There is nothing in the decision of that case to show whether the set-off was considered by the judge in deciding the case, except from his above-quoted remarks, that he arrived at his conclusions from a consideration of the agreed statement of facts and of the records, but it was clearly part of the issue before the Court, unless it was waived by counsel, of which there is no evidence.

The counsel for the plaintiffs urges with a good deal of force, that the circumstances of Afu's bankruptcy gives them a right to relief in equity, and refers to the case of *Hobbs vs. Duff*, 23 Cal., 596, which supported the claim of plaintiffs in that case to equitable relief, but distinctly so, as I find from the report of the

case, on the grounds that although the claim of set-off was made in the previous case at law, the Court excluded all evidence involving the question, and held that those matters could not be adjudicated in that action, or, as briefly stated by the decision, "when the law could not give a proper remedy, as in the case of the insolvency of one of the parties, equity will afford relief." This position is not inconsistent with the principles given above, but does not, under the circumstances of the case before the Court, support the plaintiffs' claim to relief; for in the former case at law they had their remedy under the statutes and submitted the same issue to the Court that they now ask this Court to adjudicate: that Court was qualified to decide the issue and must be supposed to have decided it, although the decision does not specially refer to it. No new circumstances have developed since that time which entitle the plaintiffs to another trial. Afu was then as now a bankrupt, and all reasons in favor of obtaining the benefit of the set-off existed as imperatively then as now.

I therefore allow defendant's demurrer.

Ashford & Ashford, for complainants.

Whiting & Creighton, for defendant.

Honolulu, March 27th, 1888.

W. H. CORNWELL *vs.* JOSEPH FERNANDEZ.

IN EQUITY. BEFORE PRESTON, J.

APRIL, 1888.

Plaintiff avers that defendant claims title to plaintiff's land under an alleged lease, which claim is a cloud on plaintiff's title: and asks that the lease be cancelled and defendant enjoined from trespassing.

Demurrer sustained, because it is not alleged that any trespass has been committed or would cause irreparable injury: and the mere statement that defendant claims the land is not sufficient.

DECISION OF PRESTON, J.

The bill states that the plaintiff is in possession of certain lands situate at Kula, in the Island of Maui, under a lease dated the 29th January, 1887, made by Her Majesty Queen Kapiolani and His Majesty to the plaintiff. That the defendant claims the right of possession of said lands, and holds out that he is entitled to possession of said lands by virtue of a lease purporting to be the deed of Her Majesty under a certain pretended letter of attorney purporting to having been signed by Her said Majesty to one Moses Kealoha. That the plaintiff is informed, and believes and avers, that the defendant has no title or right or interest in said lands other than that set forth. That Her Majesty is the lessor of plaintiff and the pretended lessor of the defendant, and is now a married woman. That the claim of the defendant and the pretended lease held by him operate as a cloud upon the title of the plaintiff, to the great and continuing injury of the plaintiff, who by reason of said claim and pretended indenture of lease is disturbed in the quiet possession of said lands, and subject to continued trespasses thereon on the part of the defendant.

The bill prays that the said pretended lease be ordered to be delivered up and cancelled, and for an injunction restraining the defendant from trespassing.

The defendant demurred for want of equity.

I am of opinion that no case for an injunction is shown by this bill against the trespassing by the defendant. It is not alleged that any trespass is threatened, or that if committed it would carry irreparable injury to the plaintiff. This case in this respect is clearly within the decision in *McKibbin vs. Spencer*, 3 Haw., 574.

I also think that the bill, so far as it alleges that the pretended lease is a cloud upon the plaintiff's title, is demurrable. The plaintiff alleges and shows that no estate is in the defendant by virtue of that lease; the lease was recorded and the plaintiff took his lease with knowledge of this alleged cloud. It does not appear that the defendant has done anything to molest the plaintiff in his possession, or has threatened to do so. The mere statement that he claims to be entitled to the possession of the land is not sufficient.

The demurrer is allowed.

P. Neumann, for plaintiff.

Ashford & Ashford, for defendant.

Honolulu, April 20th, 1888.

S. F. CHILLINGWORTH *et al.* vs. W. M. LINDSEY *et al.*

IN EQUITY. BEFORE PRESTON, J.

APRIL, 1888.

A devise by a husband to his wife of all his property, to go to their children at her death, held not to come within the Rule in *Shelley's Case*, and to give the wife only a life estate.

DECISION OF PRESTON, J.

This is a bill whereby the plaintiffs seek for a construction of the will of George Kynaston Lindsey.

The will contains the following devise: "First. After the payment of all my just debts, I give and bequeath unto my beloved wife, Mary Lindsey, all of my real and personal

property, whatever it may consist of, with the proviso that at her death said property shall then be equally divided among our lawful children (heirs), to share and share alike."

On behalf of the defendants William M. Lindsey, E. R. Lindsey and J. E. Lindsey, it is contended that this devise, under the "Rule in *Shelley's Case*," gave an estate in fee to Mrs. Lindsey.

The rule referred to: "Where the ancestor takes an estate of freehold and in the same gift or conveyance an estate is limited, either mediately or immediately to his heirs, or the heirs of his body, the word 'heirs' is a word of limitation and not of purchase; so that the ancestor takes the whole estate comprised in the term, that is to say, in the first case an estate in fee simple, in the second an estate in fee tail."

I am of opinion that the rule does not apply in this case; the limitation is not to the heirs of the ancestor (Mrs. Lindsey), but to the children of the testator and of the ancestor, and comes within *North vs. Martin*, 6 Sim., referred to in Tudor's Leading Cases in Real Property and Conveyancing, etc., p. 614, where the word heirs was construed to mean children, and so to take it out of the operation of the rule.

I therefore declare that Mrs. Lindsey took an estate for life only in the property.

P. Neumann, for plaintiffs.

Monsarrat, Kinney, Whiting and Achi, for the various defendants.

Honolulu, April 21, 1880.

KAHANAIKI *vs.* KOHALA SUGAR CO.

EJECTMENT. BEFORE JUDD, C.J.

APRIL, 1888.

An estate in fee held to be created by a devise in a will, although there was no limitation to heirs of the devisee: and a condition against alienation held to be incompatible with the estate to which it is annexed, and therefore void.

The devisee held not to be estopped by his conduct from claiming his estate in fee.

DECISION OF JUDD, C.J.

This is an action of ejectment begun at the July Term, 1887, but only brought to a hearing on the 2d April, 1888. The plaintiff claims to be entitled in fee simple by purchase to a tract of land situate in Apuakohau and Kuhuiwaluhia, North Kohala, Hawaii, consisting of 134.25 acres granted to one Kahoe by Royal Patent No. 2053, and the possession of which is unlawfully withheld from her by the defendant corporation. The plaintiff introduced in evidence a copy of the will of Kahoe, the grantee of the Government, claiming that it devised this estate to one Kanakanui, and also a deed of same from said Kanakanui to herself, dated 13th July, 1880, and recorded in Liber 66, pages 135 and 136.

Kanakanui and Kahoe were brothers, and Kahanaiki, plaintiff, is their sister.

The defendant corporation disclaims as to one-half of the land. If Kanakanui took the whole estate in fee from Kahoe, then plaintiff is entitled to recover all, otherwise she is entitled to recover one undivided half, *i.e.*, one-quarter by descent from Kahoe, and one-quarter by purchase from Kanakanui.

The will of Kahoe is translated by the Court Interpreter as follows:

WILL.

I, Kahoe (k.), residing at Apuakohau, Kohala, Island of

Hawaii, Hawaiian Islands, hereby leave to Kanakanui, this 8th day of September, year one thousand eight hundred and sixty-six, he is the heir of my real and personal property, saving that he is not to sell or make improper leases of it, then (if he does so) our blood relatives may instruct him if he violates any of the directions set forth above.

In witness whereof I hereby sign my name this 8th day of September, A.D. 1866.

KAHOE.

Eye Witnesses: J. W. Moealoha, Kuae, Hakau, Nakapalaau.

I think it was the intention of Kahoe to create an estate in fee in Kanakanui, although the estate is not limited to his "heirs."

An exception to the rule requiring a limitation to "heirs" to create an estate of inheritance is where the estate is created by devise. "In such cases the intention of the testator, if clearly expressed by his last will, will be sufficient to create a fee without the use of the word 'heir.'" "All my property" has been held to be sufficient, as they show that the intention of the deviser was manifest that a fee should pass. 1 Wash. R. P., *59: *Jackson vs. Housell*, 17 Johns., 281.

In our case the testator leaves to and makes Kanakanui the heir of all his real and personal property.

Now, what is the effect of the subsequent words of the will—"Saving that he is not to sell or make improper leases of it, and if he does so, then our blood relatives may instruct him if he violates any of the above directions."

These words must mean that Kanakanui was not to sell or make improvident leases of the land, and if he attempted to do so they could be avoided by the testators' and devisees' heirs, who in this case would be the same persons. If the word "ao" in Hawaiian, translated "instruct," cannot be held to mean the right of the relatives to prevent the alienation of the land by Kanakanui, and means that they are merely to advise or "instruct" him, it has no effect to limit the character of the estate devised to him. But if this clause means that the blood

relatives may prevent alienation, it is an attempt to create a condition against alienation.

"One of the most important incidents to a fee simple is the right of free and unlimited alienation, and a condition altogether preventing alienation in a devise of lands in fee simple would be void, as being repugnant to the estate." 1 Wash. R.P., *54.

"No one can create what is in the intendment of the law an estate in fee and deprive the tenant of those essential rights and privileges which the law annexes to it. He cannot make a new estate unknown to the law." *Doebler's Appeal*, 64 Penn., 17.

There are allowed in the law certain limited restrictions to the power of alienation to the devisee or grantee of an estate in fee. "But these conditions as to time when and persons to whom alienations cannot be made, must be reasonable in order to their being valid." None such are disclosed in this case.

It seems to me that Kanakanui regarded his estate as one upon condition subsequent, and that his estate was liable to be defeated if he should sell or lease improvidently without the consent of his brothers and sisters. There is abundant testimony to this effect. But I regard this condition as one that is incompatible with the nature of the estate to which it was annexed, and by all the authorities if the condition is incompatible with the estate in fee, then the effect is to render the estate absolute in the grantee or devisee. 2 Wash. R. P., *448; Co. Lit., 206 and 223, Sec. 360, Am. Ed. of 1853; *Blackstone Bank vs. Davis*, 21 Pick., 42; *Brandon vs. Robinson*, 18 Ves., 429.

If Kanakanui misconceived the nature of his estate and let his brothers and sisters and their children into a share of the rents of the land and declined to alienate any portion of it, saying that his relatives were interested in it, this can have no effect to alter the legal character of the estate that came to him by the devise of Kahoe, unless he has estopped himself and his privies, or unless his brother and sisters have acquired an estate by prescription in the land.

I do not find that an estoppel has been created. No one has

acted upon Kanakanui's representations, the truth of which it would now be inequitable for him or his grantee to deny. The sharing of rents with his sisters, etc., would be evidence that their tenancy in common with him continued, and that there was no ouster, but they were not made tenants in common by the devise of Kahoe, and there is no pretence that any one of them has acquired an estate by prescription in any part of the land. Their enjoyment of the property was not adverse to him, but was always with his consent.

From a careful study of this will, I am unable to find a trust disclosed in Kanakanui for his own benefit and that of the heirs of Kahoe, or any semblance of a trust.

My opinion is that judgment for the entire estate claimed should be rendered for the plaintiff, with nominal damages \$1, as none are shown.

W. O. Smith, for plaintiff.

W. R. Castle, for defendant.

Honolulu, April 25th, 1888.

W. O. SMITH, Assignee of A. F. Cooke, Bankrupt, *vs.*

CASTLE & COOKE.

REPLEVIN. BEFORE JUDD, C.J.

APRIL, 1888.

Pledging of certificates of stock as collateral security, made by a mere delivery of certificates, without endorsement or transfer, vests only an equitable title in pledgee: the legal title remains in pledgor, and passes to his assignee in bankruptcy.

DECISION OF JUDD, C.J.

This is an action of replevin to recover possession of ten shares of stock of the Haiku Sugar Company (incorporated), certificates numbered from 437 to 444 inclusive, and 100 shares of stock of the Pacific Navigation Company (incorporated).

I find the facts of the case to be substantially as follows:

The plaintiff is the duly qualified assignee of A. F. Cooke, a bankrupt, and defendants are in possession of the stock in question. Mr. Cooke had been for several years carrying on a freighting business with schooners. Others were interested with him in the ownership of the vessels, and later on he procured a charter of incorporation for his business, it being named as the "Pacific Navigation Company." The charter is dated 14th of November, 1883, and Mr. Cooke was elected president, he being the principal shareholder. He had been in the habit of obtaining supplies of goods, and of borrowing money from defendants with which to carry on this business, and this was continued after the charter was obtained, until on or about October 1st, 1885, the indebtedness amounted to over \$12,000. At this date defendants asked Cooke for security, as the account was so large, and defendant gave four notes of the Pacific Navigation Company, signed by himself as president, also signed by the secretary, for \$3000 each, payable in six, twelve, eighteen and twenty-four months, at nine per cent. interest, and indorsed them personally. Defendants demanding further security, Mr. Cooke pledged 100 shares of his own in the Pacific Navigation Company, indorsed them over to defendants, and had the transfer noted on the stock register of the corporation. This was not deemed ample to secure defendants, and Cooke then, as Mr. Atherton (of defendants' firm) testified, "proposed giving us ten shares of Haiku stock, we to hold them until debt was paid. I consented, dividends to be credited on notes. We had not taken security before this. I simply took the shares with the notes and put them in our safe." The Haiku stock was not indorsed by Cooke, and no transfer was noted on the books of the Haiku Sugar Company.

The notes and the certificates of stock were placed in an envelope with the following written upon it by Mr. Cooke: "100 shares Pac. Nav. Co., cert. No. 4; 10 shares Haiku S. Co., stock cert. Nos. 436 to 445. The above certificates of stock, belonging to A. F. Cooke, passed over to Castle & Cooke for security of \$12,000 of Pac. Nav. Co., four notes \$3000 each,

October 1st, 1885, 6, 12, 18 and 24." The envelope, with its inclosures, was delivered to Mr. Atherton.

None of the notes were paid at maturity. The accruing dividends on the Haiku Sugar Company stock were collected by Castle & Cooke (who were also the agents of the Haiku Sugar Company) and by them credited on the first note, and this was communicated to Cooke from time to time. There was no definite demand made upon Cooke as indorser. There was considerable testimony introduced tending to show that demand was in effect waived, but I do not consider that it is material to the issue to inquire whether Cooke can now be legally held as indorser. The issue is whether the assignee in bankruptcy is legally entitled to the possession of the stock, or whether the defendants can hold it.

The stock in the two companies was not delivered as collateral security to Mr. Cooke's indorsement, but was intended as independent security.

No question is made on the right of defendants to hold the stock in the Pacific Navigation Company.

They acquired title to it, as pledges to secure the notes, by indorsement and delivery of the certificate in the method pointed out by the statute, *i.e.*, Section 1433 of the Civil Code. This statute is as follows: "Whenever the capital stock of any corporation is divided into shares, and the certificates thereof are issued, transfer of the shares may be made by indorsement and delivery of the certificate. The indorsee shall be entitled to a new certificate upon surrendering the old one, and no such transfer shall be valid except between the parties thereto, until such new certificate shall have been obtained, or the transfer shall have been recorded on the books of the corporation, so as to show the date of the transfer, the parties thereto, their places of abode, and the number and description of the shares transferred."

The Haiku stock was not indorsed over by Cooke, nor was the transfer recorded on the books of the Haiku Sugar Company, as it could not have been unless indorsed.

By all the authorities, the use of these certificates of stock as collateral security, made by a mere delivery of the certificates, vested in the defendants as pledgees an equitable title only. Colebrooke on Collateral Sec., 276; *Nesbit vs. Macon Bank*, 12 Fed. R., 686; *Wilson vs. Little*, 2 N. Y., 443; *Newton vs. Fay*, 10 Allen, 505.

The legal title still remained in the pledgor, and this passed to the assignee in bankruptcy, and he is entitled to the possession of the certificates.

The plaintiff contends that only a special or limited pledge of the dividends, and not of the stock itself, was accomplished in respect to the Haiku stock; but it is not necessary to consider further the nature of the pledge, if any was accomplished, as a court of law cannot deal with the equitable claim of defendants.

Judgment for plaintiff for the certificates of stock in the Haiku Sugar Company, as claimed, and for the defendants for the Pacific Navigation Company's stock.

W. O. Smith, in person.

W. R. Castle, for defendants.

Honolulu, April 26, 1888.

KANALOA *et al.* vs. J. N. QUINN *et al.*

EJECTMENT. BEFORE JUDD, C.J.

MAY, 1888.

Long acquiescence in adverse possession, though not a bar till after twenty years, held to be significant.

Plaintiffs in ejectment held not to have sustained the burden cast on them of proving their title.

DECISION OF JUDD, C.J.

This is an action of ejectment to recover one undivided half of some sixteen acres of land situate at Kapaau, Kohala, Hawaii, granted by Royal Patent No. 4888 to one Haaheo.

The plaintiff, Kanaloa, claims to be entitled to one-fourth of

this estate by descent from the patentee, Haaheo, and to one-fourth by purchase from Kane, her brother. Only the defendants George Hall and Lahapa have answered, service upon the guardian *ad litem* of the minors Quinn appearing to be defective.

Haaheo died without issue, intestate and insane, in April, 1868, and both plaintiffs and defendants admit that he left a widow, Kahue, who survived him about a year. The plaintiff, Kanaloa, claims that she and Kane (her brother) were children of Kainoa by Kawahalelee; that Kainoa was the son of Maunaoloia by Kamealani, and that Maunaoloia was the brother of Kainapau, who is admitted by defendants to be the father of Haaheo (patentee) by his wife Kilioe. The plaintiffs claim that Kukanao (k.) and Kanaloa (w.) were parents of Kainapau and Maunaoloia. The defendants concede that Kukanao was the father of Kainapau, but claim that Kainapau's mother was Kameawahine, and not Kanaloa; and they claim that Kukanao had but one child, Kainapau, and that Maunaoloia was not his son.

Some eighteen witnesses were examined, and as is common in cases like this of contested genealogy, the evidence, being mainly derived from conversations with members of the family, is very contradictory. To ascertain whether Kukanao had one son only, or whether he had two sons, requires a knowledge of events that happened in this country at the beginning of this century, when there was no knowledge of writing, and no courts and no records wherein to perpetuate these events. I am required to settle the question whether or not the grandfather of a man who died an old man, twenty years ago, had a second son by a woman whom we call his "wife," in want of a better term to distinguish the relation that then existed between man and woman long before Christian marriage was introduced here.

To guide me over this sea of uncertainty, where one class of apparently truthful witnesses declare that Maunaoloia was the son of Kukanao, and another class, apparently equally truthful

and respectable, assert that Kainapau only was known by them and their ancestors to be the son of Kukanao, I am obliged to resort to some particular features of the testimony. One is this: Nearly all the witnesses say that Kainapau, the father of the patentee (Haaheo), was known by them and all residents of Kohala to be a chief, and the defendants' witnesses say that though familiar with the family, many of them having been its retainers, they never knew or heard of Maunaoloia as being a chief or a brother of Kainapau.

I do not go to the extent of saying that it is not possible for a chief to have had a brother who was lost sight of because from a different mother of low rank, or from not being in favor with the King or high chiefs, and not have lands in his possession, or have become obscure from his having removed to a remote part of the kingdom. But the plaintiffs' witnesses locate Maunaoloia as living and dying at Kohala, and as having the same mother as well as father as Kainapau. Witnesses would, I think, be less likely to be mistaken in regard to the rank of an individual than in regard to his ancestry; and as I am of opinion that Kainapau is shown to have been a chief, I regard it as very much against the parentage claimed by defendants for Maunaoloia that he was not acknowledged by the witnesses to be also a chief.

I am also impressed with the want of knowledge shown by many of the plaintiffs' witnesses of the genealogy of the wives of Kainoa and Maunaoloia, whereas they testify very definitely of the genealogy of the men themselves.

On the whole case, I am of the opinion that the weight of evidence preponderates in favor of the defendants, and I am not convinced that Maunaoloia (the grandfather of plaintiff, Kanaoloa) was the uncle of Haaheo (patentee).

The burden of proof is upon the plaintiffs. They must recover, if at all, upon the strength of their own title and case.

There are other incidents that lead me to this conclusion.

In 1868 certain proceedings were had in the Probate Court at Kohala, before Circuit Judge Naiapaakai, in the estate of

Haaheo. The plaintiff, then thirty years old, and her family were there, and must have known of the proceedings. Kahue, the widow, applied for and was appointed administratrix of the estate, and the property was finally decreed to her as the sole heir. This was the course usually followed, if no collateral heirs appeared.

The decree is too informal to operate as a bar to this suit, and is not pleaded as such. But the silence of the plaintiff, Kana-loa, at this time, and her long acquiescence in the adverse possession of this property by defendants, though they are not a complete defense, as the Statute of Limitations had not quite run when this action was begun, are very significant, and throw great doubt on the truthfulness of her claim that she was an heir of Haaheo.

I do not proceed to discuss the nature of the defendants' claim to the land, though they have introduced deeds from Kahue, the widow of Haaheo, and have undertaken to show descent from Kilioe, the mother of Haaheo (patentee), to Kalei-mamahu, a grantor of some of the defendants. The plaintiffs' case having, in my opinion, failed, it is not necessary to discuss the defendants' title under which they have possession.

Judgment for defendants, with costs.

M. Thompson, for plaintiffs.

Kinney and Rosa, for defendants.

Honolulu, May 10, 1888.

In re JAMES BROWN.

HABEAS CORPUS. BEFORE DOLE, J.

NOVEMBER, 1888.

Petitioner was arrested upon a warrant at request of his Consul, as a deserter from a vessel; the warrant was not served till after the vessel had left port, and therefore the Consul requested his release:

Held, the deserter could only be held upon the Consul's request: and the Consul having requested that he should not be held, all proceedings under the warrant are terminated, and the man must be released.

DECISION OF DOLE, J.

The petitioner was the cook of the German bark *Printzenberg*, which was in the port of Honolulu on the 22d day of August, A.D. 1888. On that day the German Consul signed a request to the Marshal for his arrest as a deserter, which request was countersigned by the Captain of the *Printzenberg*. This document appears to have been in the possession of the Marshal for some time without being served. Some time before the 5th day of October, and after the *Printzenberg* had gone to sea, the petitioner was arrested under the charge of unlawfully landing in the Hawaiian Islands, being a Chinaman, and on the said 5th day of October, after due proceedings, was acquitted of the said offense, whereupon he was immediately arrested as a deserter from the *Printzenberg* by virtue of the aforesaid Consular request. His counsel immediately applied to the Consul, who personally informed the police authorities that he did not wish the prisoner to be taken in custody upon his former request, and that he did not now wish to hold him. The police authorities, however, retained the petitioner in custody, and the same day made a written demand on Hop Sing & Co., the agents of the *Printzenberg*, that he should be sent out of the country in accordance with Section 625 of the Civil Code. On the 6th day of October Hop Sing & Co. replied, declining to act in the matter. The petitioner remained in custody, and applied for a

writ of *habeas corpus* against the Marshal on the 1st day of November, which was issued the same day, and made returnable November 2d. At the hearing the respondent produced the petitioner, and in his return admitted the restraint, and referred to the said Consular request, the said correspondence, Sections 625 and 626 of the Civil Code, and the German Treaty, as his authority.

From the foregoing statement of the case, it is clear that the petitioner was arrested solely by virtue of the Consular request referred to. Article 23 of the German Treaty is as follows:

"Article 23. Consuls-General, Consuls, Vice-Consuls or Consular Agents may arrest the officers, sailors, and all other persons making part of the crews of the ships of war or merchant vessels of their nation, who may be guilty or accused of having deserted said ships and vessels, for the purpose of sending them on board or back to their country. To that end the Consuls of Germany in the Hawaiian Islands shall apply to the authorities, and the Consuls of the Hawaiian Islands in Germany shall apply to any of the competent authorities and make a request in writing for the deserter, supporting it by an official extract of the register of the vessel and the list of the crew, or by other official documents, to show that the men whom they claim belong to said crew. Upon such request alone thus supported, and without the exaction of any oath from the Consuls, the deserters (not being citizens of the country where the demand is made, either at the time of their shipping or of their arrival in port, or accused of or under conviction for any crime or offense), shall be given up to the Consuls. All aid and protection shall be furnished them for the pursuit, seizure and arrest of the deserters, who shall be taken to the prisons of the country and there detained at the request and expense of the Consuls, until the said Consuls may find an opportunity of sending them away. If, however, such opportunity should not present itself within the space of six months, counting from the day of the arrest, the deserters shall be set at liberty, and shall not again be arrested for the same cause."

By this we find that upon such arrest of deserters, they "shall be taken to the prisons of the country, and there detained at the request and expense of the Consuls, until such Consuls may find an opportunity of sending them away." This undoubtedly means that such deserters shall be detained if the Consul should request such detention, not in spite of the Consul's expressed wish to the contrary.

In the case before me, the petitioner was arrested under a Consular warrant more than six weeks old; the arrest was immediately followed by the request of the Consul that the man should not be held in custody under his warrant. The statutory provisions referred to in the return do not appear to apply to a case like this, where a deserter is arrested by the warrant of the German Consul under a treaty of a later date than the statute.

It is my opinion that the request of the Consul, that the prisoner should not be held in custody under his warrant, terminates all proceedings against him under the said warrant. I therefore find that no legal cause for the restraint has been shown, and order that the petitioner be discharged, and that costs be remitted.

V. V. Ashford, for the petitioner.

C. W. Ashford (Attorney-General), for the respondent.

Honolulu, November 3, 1888.

APONA *et al* vs. D. KAMAI.

ASSUMPSIT. BEFORE MCCULLY, J.

AS OF THE MAY TERM, 1888, OF SECOND CIRCUIT COURT.

A fraudulent interlineation in a written contract, made after its execution, by one of the parties, renders the instrument void *in toto*.

DECISION OF MCCULLY, J.

This case was brought in the Supreme Court at the April term, and by consent transferred for trial to the Circuit Court sitting at Hilo, the locality of the transaction and of the parties. Jury was waived; Local Circuit Judge Lyman, being a witness in the case, did not sit, and the trial was had before Mr. Justice McCully.

The plaintiffs bring action on a contract in which the defendant is the first party, and the plaintiffs the second party, for the cultivation of a tract of land in sugarcane, of sixty-five acres more or less, at the price of fifty dollars per acre. It is admitted that the contract work was well done and within the time stipulated, and it is admitted that an exact survey of the land makes it 61.92 acres, and the plaintiffs reduce the whole amount accordingly to \$3,096, give a credit for \$923.50 paid on account, and claim the balance of \$2172.50.

The defense is payment in full. The largest item in the difference between the parties is \$1400.

It appears that the defendant had previously had a contract with Alai and Anin for the planting and cultivation of the same lot of cane. That after about six months one of them became dissatisfied and wished to abandon the contract. This was assented to by the defendant, who then made the contract on which this action is brought, with the four plaintiffs, one of whom (Alai) was a party to the first contract. The defendant endeavored to maintain that the agreement, as orally made, and before it was reduced to writing, was that the four plaintiffs should take up the job where the two former contractors had

left it, and for the consideration of fifty dollars per acre for the whole period of labor on the crop from planting to the finish, say about twelve months, do the final six months' labor, and receive the unpaid balance of this rate; but this was held by the Court to be inadmissible, and is mentioned only to explain the defendant's attitude in the case. He endeavored to show that such was the agreement also made in writing by producing a paper, of which the following is an English translation:

"\$200

"In consideration of what we have received, we agree to pay D. Kamai, of Hilo, Hawaii, two hundred dollars [and the debt of Alai and Alin on the former contract] at the expiration of six months from the first day of May, 1887, and the hire of the mules at the time the amount of their work shall be ascertained, out of the pay for cultivating the cane under D. Kamai."

This instrument is signed by three of the plaintiffs. It was written by Judge Lyman, except the sentence in brackets, which is interlined, which was written by the defendant.

It was shown in evidence that a few days after the execution of the contract, with the acknowledgment of signatures in the office of the Circuit Judge, the parties, one of the plaintiffs excepted, came again and had conversation respecting their agreement, and that it resulted in Judge Lyman, who explained the business to the plaintiffs, writing the above instrument as expressing what was further agreed upon.

The defendant swears that the interpolated matter was written in before the three plaintiffs signed, with the knowledge of Judge Lyman, and a full explanation to the plaintiffs, and that the unexpressed amount of the debt of the old contractors which the new contractors agree to take up was \$1400.

Two natives who were in the office give some support to this statement. Judge Lyman testifies that he remembers no such alteration of the instrument.

Without discussing at length all the incidents upon which my conclusion is formed, I say I am clearly of opinion that the testimony of the defendant is wholly false in respect to this

having been written before the signature. The instrument is entitled on the back, in the defendant's handwriting: "Note (*bila aie*) of Alai and Ahuna and Apona and Awana, \$200." It was always in defendant's possession, never having been surrendered to plaintiffs after payment, and would seem to have been so endorsed before he undertook to make it an obligation for \$1600.

The defendant's copy of the contract was not exhibited in the trial at Hilo. It is shown here. There is in it an obvious and apparent interpolation in these words: "and to pay the debt of Alai and Alin on the old contract, which is \$1400." This is a more foolish instance of an attempt to misrepresent the agreement made between the parties than the alteration of the so-called "note," as the plaintiffs' copy would always confute it.

The agreement being susceptible of only one reading, that is, of fifty dollars per acre for the service which the plaintiffs were to perform, the defendant's claim of \$1400 cannot be considered.

The plaintiffs object to the so-called "note" as to any operation against them on the ground that it is signed by only three of themselves, who sign as individuals, and do not bind the partnership or the fourth plaintiff; and secondly, because having been fraudulently altered in a material respect by the defendant.

The law seems to be clear and unvarying, that such an alteration makes the instrument void in toto, the good part not remaining obligatory.

This stands on good reason. So far as the altered contract is concerned, one party has not agreed to it, and, so far as the original contract, the party who alters it cannot have the privilege of holding the party whom he has attempted to defraud, when the attempt has failed. *Wood vs. Steele*, 6 Wall., 80.

I therefore make no allowance for the \$200, so far as it is supported by this instrument. Evidence as to the allowance and payment of this amount will be considered.

There remains a series of payments and charges which are to be allowed, so far as the amounts can be ascertained from the very imperfect and untrustworthy accounts and memoranda of the defendant, in connection with the testimony of the parties.

The contract provides for the payment to the contractors (plaintiffs) of \$200 for each month—\$1200 for the six months—and the balance, if any, at the end of the term and the work.

The defendant's accounts of his payments and charges are most unsatisfactory. In the uncertainty of the testimony I am sufficiently satisfied to allow as follows:

Payment June 10	\$200	—less sundry charges, \$80 00	
“ July 12	200	“ “ “	60 00
“ August 15	200	“ “ “	65 00
“ September 17.....	200	“ “ “	15 50
“ October 22	24		
“ October —	50		
Final payment	270		
			\$1144
Mule hire	12		
			\$1156

The commission spoken of in the contract, but without a statement of the rate, or of the amount on which it was to be charged, I cannot allow beyond what may be included in the amounts withdrawn from the sundry payments. The plaintiffs testify that a part of these deductions were payments on account of the \$200 expressed in the note.

The defendant's claim for \$430 as the amount of sundry payments and charges is not substantiated by definite items. No evidence, such as would support a book account, is given. It is disallowed.

The account, then, stands thus:

For 61 92-100 acres at \$50.....	\$3096 00
Less payments on account.....	1156 00
	\$1940 00

For the balance, \$1940, I give plaintiffs judgment, with interest from May 30, 1888.

V. V. Ashford, for plaintiffs.

W. R. Castle and D. H. Hitchcock, for defendant.

December 27, 1888.

THE KING *ex rel* G. W. MACFARLANE vs. W. L. GREEN,
Minister of Finance.

MANDAMUS. BEFORE PRESTON, J.

JUNE, 1889.

Salaries in the Appropriation Bill are payable monthly.

A petition for Mandamus alleged that His Majesty appointed petitioner as Chamberlain: the return of respondent denied that petitioner had been legally appointed: held, not a sufficient denial of the allegation; if respondent intended to question the validity of the appointment, he should have alleged the grounds on which he relied.

The office of Chamberlain is personal to His Majesty; there is no legal necessity for the appointment to be by commission or in writing, and it does not require the approval of the Cabinet.

But the Chamberlain having been absent from the Kingdom during the period for which he claims salary, he was not in a position to perform the duties of his office, and was therefore not entitled to the salary appropriated by the Legislature: and the Court declines to issue a writ of mandamus to compel the Minister of Finance to pay the salary.

DECISION OF PRESTON, J.

This is a petition for a writ of mandamus.

The petitioner alleges that the respondent, William L. Green, is the duly appointed and acting Minister of Finance of the Hawaiian Kingdom, and as such has charge and control of the Treasury and the funds of this Kingdom.

That on the first of October, 1888, His Majesty Kalakaua, of the Hawaiian Islands King, appointed petitioner as one of his officers of his household, to wit, as his Chamberlain, and that from and after that date petitioner has been and now is such Chamberlain, and acting as such.

That the Legislature of the Kingdom has, during its session in the year 1888, to wit, on the 11th day of September, A.D. 1888, appropriated the sum of six thousand dollars as a salary for such Chamberlain during the two years beginning April 1st,

1888, and ending March 31st, 1890—that is to say, the monthly salary of two hundred and fifty dollars—as compensation for the services rendered by such Chamberlain, and that petitioner is informed and believes, and upon such information and belief avers, that for the purpose of paying said salary there are now and at all times have been sufficient moneys and funds in the possession and under the control of the respondent, being part of the particular fund so appropriated by the Legislature.

That on March 12, 1889, petitioner drew his salary draft for the months of October, November and December, 1888, and January and February, 1889, and caused the same to be presented for payment, and payment thereof to be demanded from respondent at the Treasury of the Hawaiian Kingdom, and received in response thereto a letter from the said respondent, W. L. Green, of date March 13, 1889, a copy of which is annexed to the petition, informing petitioner that his said appointment to the office of Chamberlain had never been approved or recognized by the Government, and declining to pay the said draft; and that the said respondent unjustly refused and still refuses to pay the same or any part thereof.

Wherefore petitioner prays that the Court issue its writ of mandate commanding the said respondent to pay to petitioner the said salary, or to show cause, if any he have to the contrary, before the Court at a day and place to be fixed.

Following is a copy of the letter referred to:

“Finance Department, Honolulu, H. I., March 13, 1889.

“G. W. Macfarlane, Esq. Sir: I have to acknowledge the receipt of yours of yesterday's date, informing me that Mr. James W. Robertson, as Vice Acting Chamberlain by appointment of His Majesty the King, has performed the duties of Chamberlain from October 1st, 1888 (the date of your appointment), to March 1st, 1889, after which you have performed the duties. You ask, therefore, that the salary appropriated for the service be paid to Mr. Robertson, and you have drawn a draft on this department for your salary, \$1250, and endorsed it over to him. I have now to inform you, as I did verbally soon after

your arrival, that your appointment to the office of Chamberlain has never been approved or recognized by the Government. I cannot, therefore, pay your draft on this department for your salary whether it be endorsed over to Mr. Robertson or anybody else. I return the draft enclosed herewith.

"I remain your most obedient servant,

"W. L. GREEN, Minister of Finance."

An alternative writ was issued by me on the 6th day of May last, to which the following return was made:

"The return of William L. Green, respondent, to the alternative writ of mandamus issued in the above entitled case on the sixth day of May, 1889, and to this respondent directed.

"And the said respondent admits unto the Court here that he has not paid to the said George W. Macfarlane the sum of money, nor any part thereof, in said writ alleged to be due to said George W. Macfarlane as salary in, of and concerning the office of His Majesty's Chamberlain, and for cause of such non-payment this respondent respectfully represents as follows, to wit:

"1st. That respondent is the legal custodian of the funds of the Hawaiian Government.

"2d. That the Legislature of the Kingdom in and by an Appropriation Bill and Act, passed September 11th, 1888, did appropriate the sum of six thousand dollars for the payment of a salary for a Chamberlain to His Majesty during the present fiscal period, to wit, from April 1, 1888, to March 31, 1890, inclusive; but respondent denies that there is any obligation upon his part to pay such salary monthly, or at any stated periods of less than said biennial fiscal period.

"3d. Respondent denies that said George W. Macfarlane has been legally appointed to or commissioned as the Chamberlain of His Majesty, or that said Macfarlane was such Chamberlain during the months of October, November and December, 1888, and January and February, 1889, or at all, or that he is now such Chamberlain; and respondent denies that said Macfarlane has during said months, or at all, performed the duties of such Chamberlain to His Majesty.

"4th. Wherefore said respondent respectfully submits to the Court here that the foregoing constitutes sufficient cause for his not having paid to the said George W. Macfarlane the salary of and pertaining to the said office of His Majesty's Chamberlain, and prays that said writ, so issued and directed to this respondent herein as aforesaid, be dismissed."

The case was submitted without oral argument, upon briefs filed, and it is for me to consider whether the return shows sufficient cause against obeying the writ.

It is to be regretted that the return does not more fully state the facts upon which the respondent relies in support of his contention that the relator has not been legally appointed Chamberlain.

It appears to me that the first ground alleged by the respondent, that there is no obligation to pay this salary monthly, or at any stated periods of less than the biennial fiscal period, is untenable. The practice of the Government has been to pay salaries monthly, and with a few exceptions where the salaries are small, such as clerks of Circuit Courts and some few others, where for convenience the parties have drawn their drafts quarterly, all salaries and allowances have been so paid; and I must assume that the Legislature was aware of this practice in passing the Appropriation Bill, and did not consider it necessary to insert any special direction; and it seems to me to be absurd to suppose that the Legislature should intend that persons to whom salaries are appropriated should perform their duties for two years without any payment, and in the event of their death or resignation during such period be deprived of all remuneration for the period during which they performed their duties, which would be the result should I hold that the appropriation is only payable at the end of the fiscal period, to a person who has performed his duties for the whole of such period.

I now come to the grounds relied upon in the third paragraph of the return, the first being a denial that the relator has been legally appointed to or commissioned as the Chamberlain of His Majesty. This denial is not, in my opinion, in itself a sufficient

answer to the allegation in the petition, that on the first day of October, 1888, His Majesty appointed the relator as one of his officers of his household, to wit, as his Chamberlain. The return does not deny the appointment by His Majesty, and according to all rules of pleading applicable in these cases it must be taken that the allegation in the petition is admitted. If the respondent intended to raise a question as to the validity of such appointment, he should have alleged the grounds upon which he relied.

The Attorney-General, in his brief, submits that if the Court should feel called upon to decide upon the validity of the appointment made by His Majesty without the approval of a Minister, and against the protest of the Cabinet as a whole, then he also submits that no such power is vested in the King.

It does not appear by the return, or in any manner, that the appointment was made without the approval of a Minister and against the protest of the Cabinet as a whole; and it does not seem to me that it is within my province to consider any such question, except so far as the point may be gathered from the proceedings.

It appears from the letter of the respondent to the relator, referred to in the petition, that the only ground then taken for the refusal to pay the salary was, "that your appointment to the office of Chamberlain has never been approved or recognized by the Government." Now, from the fact of the writ being allowed, the respondent should have known that the Court was at all events *prima facie* of opinion that such excuse was insufficient.

However, in order that my views may be known to the parties, I will deal with the case, though reluctantly, as if the reason stated in the letter had been expressly restated in the return.

It will be necessary, in the first place, to consider what is the status of the Chamberlain. It is not a statutory office, the duties appertaining to which are defined by law. The statutes creating the office and defining the duties were repealed by the Civil Code in 1859, and until the session of the Legislature of 1864-5 no provision was made for the payment of such an

officer, when an appropriation of \$5000 was made for the "salary of His Majesty's Chamberlain and Secretary," and the appropriation for "Chamberlain and Secretary" continued until 1888, when it appears as "Chamberlain" only.

The duties of the Chamberlain have been personal to His Majesty, and it is now for the first time, so far as I am aware, and I have had many opportunities from my connection with former Governments of knowing, that the right of the Government to approve of the appointment has ever been asserted, and it is not suggested by the respondent that it has been.

The Attorney-General, in his brief, refers to the practice in Great Britain, where such an official would retire with the Ministry, and refers especially to the question which arose early in Her present Majesty's reign as to the appointment of the Bedchamber women, and claims that by analogy the same rule should apply here.

I do not think there is such analogy; the rules regulating the holding of offices in Great Britain and the responsibility of Ministers have been the growth of centuries, and are not and cannot be applicable here according to our Constitution. In fact, if the practice obtaining in Great Britain were applicable and in force here, the Court would not have to consider this case, because if His Majesty would not act upon the advice of his responsible advisers in matters in which they consider themselves responsible, they would have to give way or resign.

I am of opinion that the office of Chamberlain is personal to His Majesty, and that there is no legal necessity for the appointment to be by commission or in writing, and that it does not require the approval of the Ministers.

Should a person be appointed to the office whom the Ministers consider objectionable, they can exercise some control in the Legislature by declining to ask for a vote for the salary.

I therefore hold that this portion of the cause shown is insufficient.

I come now to the remaining ground alleged in paragraph 3, wherein "the respondent denies that said Macfarlane has

during said months, or at all, performed the duties of such Chamberlain to His Majesty."

This allegation is not traversed, replied to, or excused by the relator, and I must therefore take it to be admitted, especially as the statement appears in the respondent's letter to the relator, that the respondent was informed by the relator "that Mr. James W. Robertson, as Vice Acting-Chamberlain by appointment of His Majesty, has performed the duties of Chamberlain from October 1st, 1888, to March 1st, 1889."

I regret that the letter referred to was not set out in the petition or return; but, on the pleadings, I must take it to be admitted that the relator did not and was not in a position to perform the duties of his office, and that therefore he was not entitled to the salary appropriated.

Upon this point I think the cause shown is sufficient and must be allowed, and the peremptory writ refused.

C. W. Ashford (Attorney-General), for respondent.

P. Neumann and *C. L. Carter*, for relator.

Honolulu, June 12, 1889.

THE KING *vs.* J. R. ROBERTSON.
IN THE MATTER OF ALLEGED CONTEMPT OF COURT BY THE
ATTORNEY-GENERAL.
BEFORE MCCULLY, J.
JULY TERM, 1889.

At Common Law the Attorney-General has the right, on his sole responsibility, to enter a *nolle prosequi* in a criminal prosecution: but the Common Law is not in force, as such, in this country.

The uniform practice in the Supreme and Circuit Courts of this Kingdom has been that the Attorney-General "asks leave of the Court" to enter a *nolle prosequi*, giving some satisfactory reason therefor.

The Attorney-General cannot continue a criminal case, except by leave of the Court, for cause shown: and the same rule must be applied as to entry of a *nolle prosequi*.

The Court will not compel the Attorney-General to prosecute, nor punish him for contempt if he declines: but it may refuse to consent to the entry of a *nolle prosequi*, and consent is refused in the present case.

DECISION OF MCCULLY, J.

When this case was reached on the calling of the calendar the first day of the term, His Excellency Attorney-General Ashford said that he asked leave to enter a *nolle prosequi*, or that he desired to or moved to enter a *nolle prosequi*, or to that effect, the precise words used not being then noted, giving as a reason therefor the absence from the Kingdom of one Louis Magoney, whom he styled the prosecuting witness.

The Court responded that it would take the matter of granting leave to enter the *nolle prosequi* under advisement, and upon the following day announced that it did not deem the absence of this witness a sufficient reason for not bringing the case to trial if he were not the sole witness on which the case depended, which was not alleged, and therefore declined leave of Court for the entry of a *nolle prosequi*.

Thereafter, Alfred S. Hartwell, Esquire, requested the Court that he be allowed to appear in this matter. On the 6th of July Mr. Hartwell presented argument to the Court as "counsel for the Attorney-General, on the right of the Attorney-General to decline to prosecute."

For the complete understanding of the position taken by the learned counsel for the Attorney-General, his brief is here given in full:

BRIEF OF A. S. HARTWELL.

The Attorney-General having *nol. pros'd.* the case, and the defendant by his counsel being present in Court and consenting thereto, the Court said that its consent was required, which it refused to give. Later on the Court declared that it would hear argument on the question of the right of *nolle prosequi*, and it is on that question that counsel for the Attorney-General now appears.

1. The Attorney-General and his counsel claim that it is the unqualified, exclusive and absolute right of the Attorney-General, upon his official responsibility, for the discharge of which he is not responsible to the Justices of this Court, to decide whether he will or will not prosecute indictments as well after they are found as before. The expression *nolle prosequi*, or more fully, *dicit nolle prosequi*, means that the Attorney-General says that he will not prosecute. In such case, who can make him prosecute? It is an absurdity in terms to say that he can be forced into the prosecution. No writ, process, order or rule of Court known to the law can be suggested, having such effect. It would assign to the Court the duty of a prosecutor, contrary to all imaginable theory.

The Court is not the guardian, protector or enforcer of the rights of the Crown or Government, or, to use the American and popular expression, of the People, but only of the parties brought before the Court in any particular case. If the Attorney-General discontinues a prosecution after a jury is impanelled and sworn, or, later still, after the case is submitted to the jury, or even after a verdict of guilty is rendered, the Court has only to say

whether such discontinuance, if opposed by the defendant, shall operate as an acquittal.

The statute provides that, before the indictment is found, the defendant may at any time be released from custody and from the charge pending against him, upon the Attorney-General filing a certificate with any Judge of the Supreme Court that he declines to present an indictment, the Judge being required thereupon to order the discharge. In such cases no reasons are required to be named by the Attorney-General for his course, and the statute leaves no discretion to the Judge but to order the defendant's release.

The only reference which the statute makes to releasing a defendant without trial, and after indictment found, is that a failure to prosecute at the term next ensuing (unless the cause shall have been postponed, or the venue be changed, by the Court), "shall operate as an acquittal of the accused, and the Court shall order his discharge from custody."

No order of Court can prevent such "failure to prosecute," whether it result from want of testimony, lack of preparation, or from ill-considered or well-considered, from good or bad, reasons on the part of the Attorney-General. He is not required to give any reasons for not prosecuting.

2. The duties of the Attorney-General, as defined by the Act of July 27, 1866, require him to appear personally or by deputy in Courts of Record in all Crown or Government cases, and to be vigilant and active in detecting offenders against the laws, and to prosecute the same with diligence. The Constitution makes him a member of the Cabinet, and, as such, one of the King's special advisers in the executive affairs of the Kingdom, removable only upon a vote of want of confidence or upon conviction of felony, and subject to impeachment.

The Constitution, Article 20, declares that "the supreme power of the Kingdom, in its exercise, is divided into the Executive, Legislative and Judicial. These shall always be preserved distinct."

If the judicial power can be extended to requiring the

Attorney-General, the head of one of the executive departments, and a special adviser of the Sovereign, to prosecute any specified case on penalty of fine or imprisonment, this would not permit the exercise of executive and judicial powers to be preserved distinct: it would annul the discretionary and voluntary exercise of executive power, as far as the Attorney-General is concerned. That officer is liable to lose his office if convicted of felony, impeached, or if the Legislature shall vote want of confidence in him; but in no other way can his official conduct or misconduct be controlled, except in case of his committing a criminal offense.

Whether, as used to be claimed here, Crown cases always have precedence to civil cases on the calendar of Court, or the Court may direct the order of trials to suit its own views, is irrelevant to the question under consideration. Whether the Attorney-General shall or shall not be vigilant in detecting and prosecuting offenders, the public will note, and by their votes at the polls and by their elected representatives in the Legislature will decide. But such decision is not entrusted to the judicial power.

3. The exclusive power to *nol. pros.* a case, at any time before a jury is sworn to try it, rests with the Attorney-General, even if the defendant objects, according to the law as laid down by English and American text writers and Courts, certainly in England since the days of Charles II.

"The King's Attorney, *qui sequitur pro domino rege*, may enter an *ulterius non vult prosequi*, which hath the effect of non-suit." 1 Coke Litt. 139 b.

"For obvious reasons, the functions of the Court and prosecuting officer are entirely distinct. The Court cannot usurp the duties of his office and say what cases shall and what shall not be prosecuted. The law has lodged that duty with officers selected for that special purpose, and who are responsible for the manner in which they perform those duties." Smith, J., in *State vs. Tufts*, 56 N. H., 138.

"Certainly the Court is not legally competent to give any

advice on this subject. The power of entering a *nolle prosequi* is to be exercised at the discretion of the attorney who prosecutes for the Government, and for its exercise he alone is responsible." *Comm. vs. Wheeler*, 2 Mass., 173.

"The question raised by the exceptions thus resolves itself into the single inquiry whether, after an indictment has been found and returned into Court, and before any proceedings have been had thereon, the attorney for the Government has authority to enter a *nolle prosequi* on the indictment. We can hardly deem this an open question. The exercise of such an authority is not only in conformity to the ancient and uniform practice in the Courts of this Commonwealth, but it has been distinctly recognized by this Court as being reasonable and proper, and not inconsistent with the legal rights of the defendant." *Commonwealth vs. Tuck*, 20 Pick., 336, 365; *Commonwealth vs. Wheeler*, 2 Mass., 174.

"In the latter case it is expressly stated by the Court that it is perfectly clear that a *nolle prosequi* may be entered at the pleasure of the prosecuting officer before a jury is impanelled. The reasons for the practice are there stated, and they are numerous and decisive. Nor can we see that there are any valid objections to it. Such a mode of disposing of an indictment cannot in any way impair or affect the rights of the accused party in any future prosecution for the same offense. That it will not be resorted to capriciously or oppressively, so as to work any undue hardships on defendants, is sufficiently guarded against by intrusting the exercise of the power to the sound discretion of an officer of the Government, whose function it is to watch over and direct the course of criminal prosecutions, and who can have no motive to use the authority vested in him in manner inconsistent with a due regard to the rights and interests of all parties." *Commonwealth vs. Smith*, 98 Mass., 10.

Cockburn, C.J.: "It is the undoubted right and power of the Attorney-General, as the representative of the Crown in matters of criminal law, to enter a *nolle prosequi*, and thereby at once to stay proceedings in a criminal suit of information, and no in-

stance has been cited, nor can any be found, in which the Court, after a *nolle prosequi* had been entered by the Attorney-General, has taken upon itself to direct such proceedings to be prosecuted. Even if this Court should do so, there is nothing to prevent the Attorney-General from entering a *nolle prosequi toties quoties*."

"It is not for this Court to create a precedent of this sort where none before existed—a precedent contrary to the understanding of the profession, and one that would be fraught with public mischief. Under ordinary circumstances, no doubt the Attorney-General would act wisely in calling the prosecutors before him before he proceeded to enter a *nolle prosequi*, but there may be particular cases in which from the knowledge of the facts, or the particular nature of the charge, the Attorney-General might think it necessary to enter a *nolle prosequi* without adopting that course. It cannot be contended for one moment that there can have been any abuse exercised by one whose functions are of such highly responsible character; but if there had been—and I only put it hypothetically—the remedy is not by an application to this Court to interfere by the exercise of its undoubted power and prerogative, but to hold him responsible before the High Court of Parliament. I am not at all disposed to establish a precedent in such a case, and I think, therefore, there should be no rule."

Crompton, J.: "I am of the same opinion. I think we have no power to do what is now asked of us, and I think we ought not to interfere with the undoubted power of the Crown vested in the Attorney-General. There is nothing in the present case to take it out of the general rule. I think the Attorney-General can interfere in any public prosecution whenever he pleases, and all the cases referred to are clearly distinguishable from such one as this."

Blackburn, J.: "I am of the same opinion. This particular branch of the prerogative is entrusted to the Attorney-General, who, on his own responsibility, determines whether the prosecution shall go on or not."

Mellor, J., concurred. *Regina vs. Allen*, 9 Cox C. C., 122.

"The following is related of Sir John Holt, Chief Justice of the K. B., in the reigns of William and Anne. There were some persons in London who pretended to possess the power of foretelling future events, and who were called the French prophets. Holt having upon occasion committed one of these to prison, a disciple of his came to the Chief Justice's house and desired to see him. On being admitted, he said: 'I come from the Lord, who bade me desire thee to grant a *nolle prosequi* for John Atkins, his servant, whom thou hast thrown into prison.' 'Thou art a false prophet and lying knave,' returned the Chief Justice: 'If the Lord had sent thee it would have been to the Attorney-General, for the Lord knoweth that it is not in my power to grant a *nolle prosequi*.'" In *People vs. McLeod*, 1 Hill, 405, Note f.

"And, without prejudice to any such fresh prosecution, the Attorney for the State may *nol. pros.*—that is, discontinue—an indictment at any time after it is found, previous to the moment when, the defendant having pleaded, that is, made answer to it, a traverse jury is impanelled and sworn to try the cause." 1 Bishop Cr. Law, Section 7, 886.

"A *nolle prosequi* is the voluntary withdrawal by the prosecuting authority of present proceedings on a particular bill, and at common law is a prerogative incident to the Sovereign. It may at common law be entered at any time before judgment, and the practice is usual during trial or after conviction to enter it upon objectionable counts, or parts of counts, so as to confine the verdict to those which are good. Courts have, it is true, frequently held that the prerogative is one subject to their control, while the case is on trial, and that the Attorney-General has no right, after the jury is impanelled and witnesses called, to withdraw the case without their sanction." Wharton Cr. Pr. & Pl.

"It is scarcely necessary for the Court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the Court is solely to decide on the rights of

individuals, not to inquire how the executive or executive officers perform duties in which they have a discretion. Investigations in their nature political, or which are by the Constitution and Laws submitted to the Executive, can never be made in this Court." *Marbury vs. Madison*, 1 Cranch, 137.

"Also the King's Attorney-General may enter a *nolle prosequi*, which has the effect of a nonsuit, to any information or action brought by the King only." 3 Bac. Abr. tit. Prerogative, page 102.

"After indictment found, and until trial commences, the District Attorney's authority may be said to be absolute. He can then abandon the prosecution at his pleasure. He can enter a *nolle prosequi* even without the consent of the Court." Per Field, J., in *U. S. vs. Schuman*; U. S. Cir. Court for Cal.; 7 Sawyer, 439.

BY THE COURT.

The proposition of the counsel for the Attorney-General that at the common law the Attorney-General of England and of States which have adopted this part of the common law has the right upon his sole responsibility to enter a *nolle prosequi*, is not doubtful, and has not been questioned by this Court.

But the common law is not in force in this Kingdom. This is not an English colony which has brought out the law of England to be in force here, except as modified by express statute. The law of this country is found in our enacted statutes, and in the precedents established by decisions of our Supreme Court, in which it is allowed (Section 823 of the Civil Code) "to cite and adopt the reasons and principles of the admiralty, maritime and common law of other countries, and also of the Roman or civil law, so far as the same may be founded in justice and not in conflict with the laws and customs of this Kingdom." This doctrine has been frequently expressed by the Supreme Court. This part of the common law has not been enacted nor adopted here; nor could a duty and power of the Attorney-General be imposed or assumed, or withdrawn, upon consideration of what was the law of other countries.

The uniform practice of the Supreme Court and of the Circuit Courts has been that the Attorney-General, by himself or his deputy, when desiring to *nol. pros.* a case after indictment found, asks leave of the Court that it may be so entered, giving the Court or the presiding Justice some satisfactory reason therefor. These reasons are not always given publicly in the Court. They are frequently presented to the Judge in his office, and upon the motion being made in Court the Court in response sometimes states the reason given, and sometimes merely says that for satisfactory reason given the *nol. pros.* may be entered. I state this to be the custom of the Court upon my own knowledge as a Justice for twelve years, and as a deputy of the Attorney-General for four years, and upon inquiry of my brethren on the Bench, two of whom have held the office of Attorney-General, and who say that the practice has been uniformly as I have stated it.

Our Statute of Criminal Procedure (Act of 1876, C. L., page 338) provides for the discharge without prosecution of persons imprisoned under committal for trial for any offense, by the Attorney-General's granting a certificate to the Justices or Justice of the Supreme Court that *he declines* to present an indictment in the specified case, whereupon the Justice or Justices *shall* issue to the Marshal a warrant of discharge of such person from custody.

This statute was enacted in 1876, and as it provides only this method of discharge upon the sole responsibility and authority of the Attorney-General, I think it may be inferred that the existing practice was not intended by the Legislature to be varied in other respects.

The Court has control over a continuance of a case by Section 34 of the Criminal Procedure Act of 1876: "If the Court before which any person is indicted shall, upon the application of such person or otherwise, be of opinion that he ought to be allowed further time to plead," etc., the Court may grant further time or continue to another term, certainly without the control of the Attorney-General.

Section 13 of the same Act gives the power to the Court to change the venue of any criminal proceedings to any other Court of Record, for such reasons as the justice of the case may require, and subject to such conditions as the Court may in its discretion impose. In regard to all which the Attorney-General would be heard, but the decision and control would be of the Court.

The Act of 1866, now in force, defining the duties of the Attorney-General (C. L., p. 315) requires him to be vigilant and active in detecting offenders against the laws, and to prosecute them with diligence. The law (Sections 1 and 2 of the Act of 1876) requires the Attorney-General to present the indictment before the next ensuing term after the commitment to the Judge, who shall, after examination, certify upon each bill of indictment whether he finds the same a true bill or not.

What is the examination which the Judge is required to make?

There is no grand jury here, and to some extent the Judge performs its functions. The evidence taken before the committing magistrate is submitted to him, and he hears statements from and makes inquiry of the Attorney-General to the extent of ascertaining if it is a case which ought to be tried. In the supposable case of its appearing that the evidence was frivolous, and entirely unsupporting the charge, he would not find it a true bill, and the accused could not be put on trial. Or, in the supposable case that the evidence being examined showed a case, say of embezzlement, when the indictment charged forgery, he would not approve the indictment for forgery.

Again, if the form of the indictment was obviously defective, though not charging a different offense from that presented in the evidence, he would probably not find it a true bill. The Court's approval of the indictment as to form in no wise precludes or prejudices any showing by defendant's counsel that the indictment is faulty, and motions to quash or otherwise.

The Court's approval of the bill as being founded on evidence in no wise identifies the Court with the prosecution. I say this

without hesitation on the part of every Judge living and dead who has occupied this Bench.

Examining the statutes previous to those now in existence above referred to, the first is the statute of 1846, which organizes the executive departments, and by which the office of Attorney-General was first constituted, and his duties prescribed (pages 264 *et seq*). Section 8 prescribes that every prisoner committed for trial shall be arraigned upon an indictment allowed by the Judge. * * * And (Sec. 9) after plea the said Attorney-General shall, unless a postponement be granted for cause by the Court, proceed to make good by proof all or any of the counts in said indictment. So it appears that the Attorney-General had not the sole and exclusive control, now claimed, of the prosecutions, for he could not continue a case unless by leave of the Court granted for cause shown. An absolute power to continue a case, without cause shown and without leave, is equivalent to a power to continue and not prosecute at all. This he had not, but was commanded by the law to prosecute.

In a single instance under this statute was the power given to the Attorney-General to enter a *nolle prosequi*. Section 3: "When a writ of *habeas corpus* shall have been issued by any court of justice to inquire by examination of witnesses into the cause of the legality of the imprisonment of any alleged delinquent or criminal awaiting his trial, the Attorney-General * * * shall attend to see that the alleged delinquent or criminal be not enlarged without just cause. He shall represent the prosecution in all such cases, and he may, when the public interests require it, enter *nolle prosequi* against a suspected person." This statute is nearly equivalent to the statute of 1876 above cited. The rule of *expressio unius est exclusio alterius* well applies here. The authority is given expressly in a defined instance, viz., of preliminary inquiry for commitment, and is not given otherwise. The instance allowed is of a case not yet under indictment found. The general mandate of the law is that the Attorney-General *shall prosecute*.

By a joint resolution of the Legislature in 1846, subsequent

to the passage of the organic Acts in the same year, authority is given the Cabinet to appoint other public prosecutors, and to the Judges of the Superior Court to appoint district attorneys, pending the appointment of a new Attorney-General; the then Attorney-General, Mr. Ricord, it appears, was about to leave the Kingdom, and his office was not filled.

In 1859 (Civil Code, Sections 1080-1095) the law provided only for district attorneys, an Attorney-General not being constituted by the Constitution of 1852. These district attorneys were appointed by the Justices of the Supreme Court for each judicial circuit of the Kingdom. They gave bond to the Chief Justice; they were commissioned for the term of two years, unless sooner removed by the Justices of the Supreme Court. They were required to prosecute offenses with diligence. No mention is made of a right to *nolle prosequi*.

By statute in 1862 the system of having an Attorney-General was restored. He was appointed by the King for a term of two years, unless sooner removed by the King. His duties were prescribed to be those which had been performed by the district attorneys in Sections 1080-1095. No power is granted to *nolle prosequi*.

By the Constitution of 1864 an Attorney-General was established, and he was made a member of the King's Cabinet (Article 42), and in 1866 an Act was passed defining his duties. It is almost throughout in the same words as the Act of 1862. His duties are again referred to Sections 1080-1095. The Act would seem to have been passed solely to state his position as "being appointed by virtue of an article of the Constitution;" but, although thus placed for the first time under the Constitution, and made a member of His Majesty's Cabinet, his duties in relation to prosecutions, and his status, rights, privileges and powers in the Courts, are unchanged from those of the officer who was created by statute only.

From this review of all the statutes touching the rights and duties of the Attorney-General, I am of opinion that the procedure which I have stated to be the custom of the Court and

of the Attorney-General is in accordance with our law, and accords with the interpretation hitherto given by the Court and by the Attorneys-General.

It is a well-established precedent of practice based on the law. I cannot set it aside. If it does not now and further commend itself, the Legislature can enact a statute authorizing another procedure.

The counsel for the Attorney-General says, in argument: "If the judicial power can be extended to requiring the Attorney-General * * * to prosecute any specified case on penalty of fine or imprisonment, this would not permit the exercise of executive and judicial powers to be preserved distinct; it would annul the discretionary and voluntary exercise of executive power, so far as the Attorney-General is concerned." This, in my view, is a misapprehension of the matter in discussion.

The Court has not ordered the prosecution of this case. It cannot and it will not do so. It has simply refused to approve and allow a motion for *nolle prosequi* upon the reason stated.

It has not and will not "fine or imprison an Attorney-General" for contempt by reason of not prosecuting a case.

It will be observed that I do not agree in terms with the statement in the opening of the argument of counsel; "The Attorney-General having *nol. pros'd.* the case * * * the Court said its consent was required, which it refused to give." The Court said it would take time to consider (the reason offered), and it could not treat the motion as made otherwise than in accordance with the established precedent of practice and procedure. This difference in statement is, however, only the difference which constitutes this controversy on the part of the Attorney-General and his counsel. It is not a question of veracity as to facts.

Having thus given the opinion of the Court upon the abstract question argued by counsel, and holding against his contention, and he having made no argument addressed to the discretion of the Court upon its previous ruling not to grant leave to *nol. pros.* the case of Robertson, that ruling might stand. But as this

particular case has been virtually brought up by allowing the further argument to be made, I have reconsidered that ruling.

I have examined the evidence given in the previous trial, excepting that of Magoney, the absent witness. There are six witnesses besides him. On their testimony, if given in a magistrate's court, I should find a true bill of indictment. I express no opinion upon the proper or probable result of a trial. It is only an opinion that it is a case to be put on trial.

But this the Court cannot order. If, when it is called for trial, the Attorney-General, being present in person or by deputy, does not prosecute, it will stand not prosecuted in fact, but without the entry of *nolle prosequi*. The Attorney-General will take his own course.

If it shall proceed to trial I will ask one of my brethren on the Bench to hold the trial, not because I deem myself to have, or to have indicated, any bias in the defendant's case, by withholding my concurrence to dismissing him without trial, but because by the collision which has arisen from this case between the Court and the Attorney-General, a sensitive condition of public feeling has been induced, under which it might be imputed that my rulings were over-strict against the defendant, urging his conviction, or were too favorable from fear of the other imputation.

July 11, 1889.

NOTE.—Mr. Hartwell and Mr. Neumann, of counsel for the defendant, requesting, immediately on the rendering of this opinion, that this Justice should himself hold the trial, he assented to do so. Trial was had later in the Term, resulting in a verdict of Not Guilty.

APPENDIX

Of Cases found too late for insertion in their proper order.

In re APUNA.

HABEAS CORPUS. BEFORE HARTWELL, J.

NOVEMBER, 1869.

Rights of persons in this Kingdom, under Writs of *Habeas Corpus*, are as fully secured by Constitutional and Statutory provisions as if the enactments of English law in this respect were spread on our statute books: and in construing our law the Court must be guided by those enactments and the decisions of American and English Courts.

Apuna was sentenced by a Circuit Court to pay \$300 fine, and costs, for selling opium without a license: he was imprisoned at hard labor by the Marshal: Held, as the sentence and the mittimus failed to express that the defendant should be imprisoned at hard labor in default of paying his fine, the imprisonment was illegal, and he must be discharged.

Costs can be imposed by the Court as part of a sentence.

DECISION OF HARTWELL, J.

The Marshal's return to the writ was as follows:

"In obedience to within writ, I do bring into this Honorable Court the body of the within named Apuna. Said Apuna was committed to my custody on the 12th day of August, A.D. 1869, by virtue of a mittimus to me directed from the Fourth Judicial

Circuit of the Hawaiian Islands, in words and figures as follows, to wit:

'Circuit Court of the Hawaiian Islands, Nawiliwili, August Term, A.D. 1869. To W. C. Parke, Esq., Marshal of the Hawaiian Islands, Greeting: Whereas Apuna (P.) has been convicted at the present term of this Court of the crime of selling opium without a license, and has this day been sentenced by the said Court to pay a fine of three hundred (\$300) dollars, with costs of Court, seventy-seven 80-100 (\$77.80) dollars:

'Therefore, you are hereby commanded to receive the said Apuna into your custody, and see the above sentence duly executed.

'Witness the Honorable H. A. WIDEMANN, Second Associate Justice of the Supreme Court, at Nawiliwili, this 12th day of August, A.D. 1869.

'[Seal.] (Signed) DUNCAN MCBRYDE, Clerk.'

"And I do hereby return this writ complied with this 8th day of November, A.D. 1869. W. C. PARKE, Marshal."

"And I do hereby make further return that the said Apuna now is and has been held to hard labor since the commitment to my custody. W. C. PARKE, Marshal."

The petitioner's traverse to the Marshal's return denies that the Court had any authority so to sentence, or that there was any crime by the prisoner committed to authorize or justify the sentence imposed, or the issuing of such mittimus, the same not being justified by the law under which he was convicted, viz., selling opium without license; denies that the said mittimus is the process of the Circuit Court of the Fourth Judicial District, as it does not bear teste of said Court; denies that the Marshal, under said process, has authority to detain and imprison said Apuna at hard labor, or in any other manner, as he is commanded to execute the sentence, and imprisonment, or imprisonment at hard labor, forms no part of the sentence nor of the command in said mittimus; denies that the Marshal has, under said writ, or by authority of any law of this Kingdom, power to execute a sentence in any manner for fine with costs; denies

that the Marshal has authority to execute a sentence for fine, or fine and costs, at hard labor, unless such sentence is so pronounced by the Court and recorded in the mittimus.

BY THE COURT.

The Constitution provides that "the privilege of the writ of *habeas corpus* belongs to all men, and shall not be suspended, unless by the King, when, in cases of rebellion or invasion, the public safety may require it;" that "no person shall be subject to punishment for any offense, except on due and legal conviction thereof in a court having jurisdiction of the case;" that "no person shall be deprived of life, liberty or property without due process of law;" that "every person has the right to be secure from all unreasonable searches and seizures of his person," etc.; that "each member of society has a right to be protected by it in the enjoyment of his life, liberty and property according to law." Articles 5, 6, 9, 12 and 14.

The statute gives Justices of this Court, in Chambers, jurisdiction "to issue writs of *habeas corpus*, for inquiring into the cause of any alleged unlawful imprisonment or restraint." Section 855 Civil Code.

What is this writ of *habeas corpus*? In many of the United States there are statutes defining its nature and force; but they are all essentially alike, and are all in substance the same with the English Statute of 31 Car. II.

It is unnecessary to refer to the different writs of *habeas corpus ad testificandum*, *ad satisfaciendum*, etc., which are so named to denote the purpose for which they were issued. The writ always intended, if not otherwise described, is the writ *ad subjiciendum et recipiendum*, which was designed to release persons from illegal confinement. The writ was known in English law long anterior to Magna Charta, which secured the acknowledgment of common rights, as follows:

39. "*Nullus liber homo capiatur, vel imprisonetur aut dis-saisiatur aut utlagetur, aut aliquo modo destruat; nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum, vel per legem terrae.*"

40. "*Nulli vendemus, nulli negabimus, aut differemus, rectum aut justitiam.*"

39. "No freeman shall be taken or imprisoned, or dispossessed, or outlawed, or banished, or in any manner destroyed; nor will we convict or sentence him, except by lawful judgment of his peers, or the law of the land."

40. "To none will we sell, to none will we deny or postpone, right or justice."

Lord Chatham, in speaking of these words in the House of Peers, used this memorable language: "They (your ancestors) did not say these are the rights of the great barons, or these are the rights of the great prelates. No, my lords: they said, in the simple Latin of the times, *Nullus liber homo*, and provided as carefully for the meanest subject as for the greatest. These are uncouth words, and sound but poorly in the ears of scholars; neither are they addressed to criticism of scholars, but to the hearts of freemen. These three words—*Nullus liber homo*—have a meaning which interests us all; they deserve to be remembered, they deserve to be inculcated in our minds—they are worth all the Classics."

After the Charter of Runnymede, the Petition of Right and the Bill of Rights were secured, and the three together form "The Bible of the English Constitution." In 1679 the *Habeas Corpus* Act of 31 Car. II. was passed. The Act of 56 George III. extended the power of the writ, and enabled the Judge before whom the writ is returned to inquire into the truth of the facts alleged therein.

It is common to speak of the *privileges* thus secured, but no sound jurist or thinker ever admitted that these privileges were anything but common rights under the law of England. The rights of persons in this Kingdom under writs of *habeas corpus* are, in my opinion, as fully secured by Constitutional and Statutory provisions as if the famous English guaranties and enactments, with merely verbal alterations, were spread upon our statute books. The writ of *habeas corpus* enjoyed here is the same in substance with the original writ as secured and vivified

by the English Acts, Bills and Charters. Anything less than this would make the provisions therefor in our Constitution and Statutes hollow and meaningless, and be contrary to sound rules of legal construction. I must, therefore, be guided by these lights, and by the decisions of English and American Courts, concerning the law of *habeas corpus*; and I think the practice of this Court has never been opposed to this view.

By the Act of 31 Car. II. persons committed or detained for any crime but treason or felony (if they are not persons convict or in execution by legal process) have a right to be brought before the Court on *habeas corpus*, and the Court within two days must discharge the prisoner, "unless it shall appear that he is detained upon a legal process, order or warrant out of some Court that hath jurisdiction." The true rule to be gathered from the authorities is, that the function of this writ does not supersede the functions of Writs of Error and Certiorari, Bills of Exceptions and Appeals. The alleged errors of a trial should be reconsidered only by the Appellate Court authorized by law to review them. No power is given, and perhaps none exists, to review the decision of a Judge discharging a prisoner on *habeas corpus*. Hence the necessity of exercising jurisdiction in such cases with discretion, and according to established principles. The Court will rarely use the writ of *habeas corpus* to effect a reversal of judgment rendered by a Court of competent jurisdiction, the mittimus showing a *prima facie* legal conviction. The officer's return, or the record brought up on *certiorari*, ought to show these legal requirements. If the process is merely voidable, and not actually void, it is regarded as good authority for the confinement of the prisoner until the judgment shall be reversed by the Appellate Court.

The petitioner's plea to the officer's return neither in legal intendment traverses, nor confesses and avoids, the facts alleged; but it is a demurrer to the legality of the imprisonment. It is claimed that the imprisonment, either at hard labor or otherwise, is illegal:

1. Because the mittimus is not duly authenticated as the process of the Court.

2. Because the law does not authorize the imposing of costs as part of the sentence.

3. Because the mittimus does not order the Marshal to imprison at hard labor or otherwise.

4. Because the law gives the Marshal no discretion or authority to imprison at hard labor or otherwise.

The first objection has no force, and was in fact not insisted upon. No statute requires the process to bear teste of the presiding Justice; the seal of the Court, with the official signature of the Clerk and the signature of the Justice of the Court who in fact presided, are sufficient.

The statute penalty for this offense is a fine not exceeding five hundred dollars, or imprisonment at hard labor for a term not exceeding six months. A "fine of \$300, with \$77 costs of Court," is a sentence within this statute. If the mittimus should command the Marshal to imprison until the payment of an extreme fine of \$500 and \$77 costs, the statute, perhaps, might sanction such order. The provision for the discharge of a poor convict at the end of one year, if he is unable to pay the "fine, or fine and costs only, or either of them," for which he "shall have been imprisoned," would seem to imply the power to adjudge payment of costs. (Sec. 2, Ch. LI., Comp. Penal Code.) So does Sec. 5, *Ib.*, which makes the officer liable if he allows the escape of any person undergoing "sentence of Court for payment of any sum as a fine, forfeiture or costs." On the other hand, Sections 6 and 7, *Ib.*, provide for execution to issue on the convict's property for costs, and that if they are not paid by him or out of his property, they "shall be paid out of the Treasury of the Kingdom."

I will not, however, volunteer an opinion on facts not before me; if such a case should arise, it would properly be reviewable on error to the Full Court. By Section 2 of the same Chapter of the Penal Code, "when a fine is not paid immediately following the offender's conviction he shall be committed to prison, there to remain at hard labor or otherwise, in the discretion of the Court or magistrate, until such fine is paid, or collected out of

the offender's property." It may be inferred from this mittimus that the fine was not paid; but imprisonment at hard labor cannot be inferred. Nothing can be presumed against the liberty of the person. The discretionary power of the Court to commit the offender to prison, "there to remain at hard labor or otherwise," was not exercised in this instance, and it is not a power which can be delegated to another. The power to pronounce the entire sentence, or to try the prisoner, may as well be delegated. The authority of the Marshal to hold this prisoner as he is doing is not under this mittimus. Is it under the general law?

The Civil Code provides: "When any person shall be sentenced to pay a fine, and to be imprisoned until such fine is paid, the time of his imprisonment shall be deemed to discharge his fine at the rate of twenty-five cents a day." (Section 221.) "Every person who shall be fined for a violation of any provision of the revenue laws shall, in case he fail to pay such a fine, be imprisoned at hard labor until such fine be paid or remitted, or until he shall have earned a sum equivalent to such fine." (Section 685.) It is enough to say of these statutes that this case comes under neither of them. This is not a case of violation of revenue laws. A sentence of fine and imprisonment is expressly provided for in the former section, and no power is there given for the Courts to extend a sentence beyond the penalty affixed by law for each particular offense, nor for the Marshal to execute a sentence never pronounced.

By Section 206 of the Civil Code, the Minister of the Interior, with the approval of the King in Cabinet Council, "may prescribe rules and regulations for the government and discipline" of prisoners. It was suggested that the prison rules authorized the Marshal to imprison Apuna at hard labor; but the suggestion was withdrawn on subsequent examination of the rules themselves. In regard to this portion of the argument, in which it was urged upon the Court that judicial knowledge must be taken of the existence and nature of such rules, I feel bound to say that I am aware of Constitutional provisions which make

void any rules going to the extent suggested. The discipline of convicts does not include the power to attach penalties not prescribed by statute and imposed by the Court. It is a right of every accused person to know beforehand what penalty may be imposed by law for the crime charged. It is the right of a person convicted of crime to be informed in open court of the sentence imposed. The statutory power to restrain and govern prisoners has been exercised, however, only within its proper legal limits.

I find no authority, therefore, for the Marshal to execute a sentence of imprisonment at hard labor in this case. Nor have I any power to remand the prisoner, in order that such a sentence may be imposed, if deemed proper.

The petitioner's counsel argued that a sentence of imprisonment could not have been passed which should exceed the limit of six months, or which, by force of other statutes, should work imprisonment exceeding six months. The question is not properly before me now, but it should be carefully considered by magistrates, in like cases, in determining what sentence to impose.

Let an order be made discharging the prisoner.

R. H. Stanley, for petitioner.

S. H. Phillips (Attorney-General), for the Marshal.

Honolulu, November 17, 1869.

THE KING *vs.* ROBERT GRIEVE.

OBSCENE PUBLICATION. BEFORE McCULLY, J., IN INTERMEDIARY COURT.

APRIL, 1883.

An obscene programme of Hula Dances, in the Hawaiian language, was printed in a newspaper office of which defendant was manager: Defendant was not acquainted with the language, did not know the nature of the matter, and considered it official because it had the imprint of the Royal Arms, and was handed to him by an officer of the Government.

Held, defendant's knowledge and intention were of the essence of the crime: and as he was not put on enquiry as to the contents of the paper, but was entirely ignorant thereof, he cannot be held criminally responsible.

BRIEF OF A. S. HARTWELL FOR DEFENDANT.

The facts shown by the prosecution do not constitute or show a criminal offense.

It is the uncontradicted evidence that this defendant is, and at the time of the printing of the pamphlet was, utterly ignorant of its meaning and of the language in which it is uttered; also, that the printing was done by the native foreman of the printing establishment of which the defendant is part owner, under circumstances which properly led the defendant to infer that high officers of the Government desired the printing for use on a public occasion. The evidence further shows that the pamphlet was used and circulated on that occasion with the Royal Arms impressed upon it.

The statute defines a "common nuisance" as the "endangering of the public personal safety or health by doing, causing or promoting, maintaining or continuing what is offensive or annoying and vexatious, or plainly hurtful to the public, or is a public outrage against common decency or common morality, or tends plainly and directly to the corruption of the morals, honesty and good habits of the people, the same being without

authority or justification by law." Penal Code, Chap. XXXVI., Section 1.

The statute enacts the Common Law, that "a party accused shall be presumed to be innocent;" also, that "everyone shall be presumed to mean the natural and plainly probable consequence of his acts." Penal Code, Chap. II., Sections 6 and 7.

The offense of committing a common nuisance by "printing an obscene pamphlet * * * manifestly tending to the corruption of the morals of youth or of morals generally" (which is the language of the statute), is not committed by one in utter ignorance of even its possible meaning, who could not ascertain its meaning of his own knowledge, and had, on the contrary, the best of reasons not to suppose that there was the slightest impropriety.

There are Common Law offenses in this Kingdom, these being defined by statute as "doing what a penal law forbids to be done, or omitting to do what it commands." Penal Code, Chap. I., Section 1.

If an act is an offense at Common Law, irrespective of statutory ingredients of the offense charged, a criminal charge in Courts governed by the Common Law may be good, if it fail to show a statutory offense. In this country, however, it is material to show a statutory offense.

"In statutory offenses there must be an evil intent, though the statute is silent on the subject." 1 Bishop Crim. Law, Sec. 345; *Watson vs. Hall*, 46 Conn., 204.

The case of *U. S. vs. Kirby*, 7 Wallace, 482, was one of a prosecution for obstructing the carriage of the mails, by arresting the carrier upon a warrant from a State Court. The United States Supreme Court held it not such an obstruction as was contemplated by the statute, and said, Field, J.: "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language, which would avoid results of this character. The

reason of the law should in such cases prevail over its letter." See 5 Barb., 203.

A licensed tavern-keeper is not criminally responsible for his bar-keeper selling liquor at his bar on Sunday without proof of an intent on his part to violate the statute. *People vs. Utter*, 44 Barb., 170.

An indictment for nuisance on premises is not sustained by proof merely that the defendant is the owner of them. *People vs. Townsend*, 3 Hill, 479.

In an indictment for selling an obscene book, a *scienter* is necessary. Wharton's Crim. Law, Sec., 297, citing 1 Bennett & Heard's Leading Cases, and several cases adjudicated.

A blind man, who cannot see, and has no reason to suspect that he is selling an obscene picture, cannot be held guilty of a criminal offense in so doing.

The law of intent is stated in Bishop on Criminal Law, Sections 301 *et seq.*: "In the law of crime, the maxim is *ignorantia facti excusat*, * * * Ignorance or mistake of facts is, in all cases of supposed offense, a sufficient excuse."

Ib. Section 302: "Since an evil intent is an indispensable element in every crime, any such mistake of facts as, happening to one honestly endeavoring to discharge all legal and social duties, shows the complained of act to have proceeded from no sort of evil in the mind, takes from it its indictable quality. A briefer expression of the same thing is, that a mistake of fact, neither induced nor accompanied by any fault or omission of duty, excuses the otherwise criminal act which it prompts."

"What is absolute truth no man ordinarily knows. All act from what appears, not from what is. If persons were to delay their steps until made sure, beyond every possibility of mistake, that they were right, earthly affairs would cease to move, and stagnation, death, and universal decay would follow. All, therefore, must, and constantly do, perform whatelse they would not through mistake of facts. If their minds are pure, if they carefully inquire after the truth, but are misled, no just law will punish them, however criminal their acts would have been if

prompted by any evil motive, and executed with the real facts in mind."

"In the law, therefore, the wrongful intent being the essence of every crime, it necessarily follows that when one is misled, without fault or carelessness, concerning facts, and while so misled, acts as he would be justified in doing were they what he believed them to be; he is legally innocent, the same as he is innocent morally." *Ib.*

The doctrine is, that one may be criminally responsible where the act itself necessarily implies either a direct evil intent, or that kind of indifference, recklessness or carelessness to which the law attaches the same consequences as if an actually evil intent existed. The Penal Code defines malice as not only "doing a wrong or injury to any person or persons, or to the public," but also as "acting with a heedless, reckless disregard, or gross negligence of the life or lives, the health or personal safety, or legal rights or privileges of another or others;" also, "the willful violation of a legal duty or obligation, and willful contravention of law." Penal Code, Chap. I., Sec. 3.

In *Rex vs. Hicklin*, 3 Q. B., 360 (1868), a leading case on the subject of innocent motive for publishing an obscene pamphlet, it is held that such motive is no defense; but, if there is no knowledge, there can be no motive, good or bad, there is no "*mens rea*."

In *R. vs. Wiatt*, 8 Mod., 129, defendant was released from a criminal charge of libel on the Court of King's Bench, being the selling of a book in the Latin language, on his affidavit that he did not understand the language.

So it was held that defendants are not criminally liable in the following cases, viz.: "1. Where a postman carries a sealed letter—per Lord Kenyon in *R. vs. Topham*, 4 Term, 129. 2. Or a parcel in which libelling hand-bills were wrapped up—*Day vs. Brean*, 2 M. & R., 55. 3. Or where the defendant could not read."

Per Lord Kenyon, C.J., in *R. vs. Holt*, 5 Term, 444: "And even if the defendant read the libel, still if the words are on the

face of them innocent, and only became defamatory when their meaning was pointed out by certain extrinsic facts and circumstances wholly unknown to the defendant, then he would still be unconscious that what he published was a libel, and such a publication would be deemed innocent; or where the libel was contained in an allegory or riddle, to which the defendant had no clue. Again, where the defendant copied a libel knowing it to be a libel, and afterwards inadvertently delivered such copy to a third person in mistake for some other paper, it is submitted that he would not be held criminally liable for such an accident, though he would be held liable in a civil case."

Citing *R. vs. Hervey*, 4 B. C., 257, Odgers on Libel and Slander, page 384.

If it comes, then, as I think it does, to a question whether this defendant is shown by the evidence to have acted with a heedless, reckless disregard, or gross negligence, I submit that he should be acquitted on the evidence, as well as on the law. So far from being shown to have acted in that manner, he is not shown to have acted at all, but merely not to have prevented his native foreman from printing a document purporting to emanate from an official source.

DECISION OF McCULLY, J.

The defendant, who is the manager and part owner of the *Hawaiian Gazette* Printing Office, is charged with the offense of Common Nuisance in printing an obscene paper, to wit, the programme of the Hulas or Hawaiian Dances to be performed as part of the coronation festivities. It is agreed that the record of the Police Court be taken, and it is admitted to be proved that the defendant is not acquainted with the Hawaiian language (in which the paper was written); that he did not know the nature of the matter printed; that it was brought to his office by an officer of the Government; and that he considered it was official matter, the person bringing it causing it to have the imprint of the Royal Arms. In fact, it was left to the Hawaiian foreman of the office, who takes sole charge of the

printing in the Hawaiian language, and Mr. Grieve had personally nothing to do with it.

It is not denied that the real import of the language and figures of speech of the paper which was printed is obscene.

The case is submitted to the Court solely on the point of law, whether the defendant is criminally liable in common nuisance for the printing of a document which contained obscene matter, which was in a language of which he was ignorant, nothing putting him upon inquiry, and the copy coming from an official or public source, and intended to be used, and in fact afterward used, by officers of the King as the programme of public festivities.

The strongest statements of authority to support the prosecution are such as are to be found in 1 Russell on Crimes, pp. 250, 251, citing Lord Hardwicke in 2 Atkyns, 472: "Though printing papers and pamphlets is a trade by which persons get their livelihood, yet they must take care to use it with prudence and caution; for if they print anything that is libellous it is no excuse to say that the printer had no knowledge of the contents, and was entirely ignorant of its being libellous." 1 Hawk., P. C. C. 73: "But if a printer is confined in a prison to which his servants have no access, and they publish a libel without his privity, the publication of it shall not be imputed to him." "Upon such foundation," says the text of Russell, "it has for a long time been held that the buying of a book or paper containing libellous matter, in a bookseller's shop, is sufficient evidence to charge the master with the publication, although it does not appear that he knew of any such book being there, or what the contents thereof were, and though he was not on the premises, and had been kept away for a long time by illness; and it will not be presumed that it was bought and sold by a stranger; but the master must, if he suggests anything of this kind in his excuse, prove it." Also from the text of Russell: "But there may be cases in which the presumption arising from the proprietorship of a paper may be rebutted."

From the above citations the rule might be derived that in

such a case as this at bar, the proprietor or manager of a printing press will be chargeable for an obscene document printed in his establishment, the legal presumption being that he knows the character of the work done by his servants, and that his ignorance through mere inattention or absence will not relieve him from a responsibility which lies on him, but that this legal presumption may be rebutted by actual proofs. I think that what is here taken as proved rebuts the legal presumption in his case. Mr. Grieve had absolutely no knowledge that the manuscript brought to his office contained obscene matter, and no circumstance called upon him to cause a scrutiny to be made of its contents. Quite the contrary. To hold that a person innocent in fact, and not chargeable with blame for being ignorant, is criminally responsible would be a harsh construction of the law.

A fundamental principle of criminal law is expressed in the maxim: *Actus non facit reum nisi mens sit rea*, i.e., the act itself does not make a man guilty unless his intentions were so.

A case very much in point is found in 1 B. and H. Lead. Crim. Cases, pp. 551-2. The indictment under the Mass. statute, similar to our own, charged the defendant with selling a book containing obscene language, but did not allege the defendant's knowledge. Abbott, J., sustained a demurrer on this ground, holding that knowledge was a necessary ingredient, and saying that the argument urged for the prosecution that it was intended to make the sale of such books punishable whether their contents were known or not, should not obtain, saying that "generally, intent, knowledge, is of the very essence of crime, and there must be very strong reasons shown to take any case out of the application of this general rule."

Upon such considerations, I find the defendant Not Guilty.

W. R. Castle, for Crown.

A. S. Hartwell, for defendant.

Honolulu, April 4, 1883.

W. C. PARKE, Assignee, vs. SEE HOP & CO.

ASSUMPSIT. BEFORE McCULLY, J.

MAY, 1887.

The Supreme Court having decided that a chattel mortgage given by a bankrupt before his bankruptcy was void, as in fraud of creditors: held, that the bankrupt's assignee is entitled to recover from the mortgagees the proceeds of goods, sold by said bankrupt, covered by said chattel mortgage.

AGREED STATEMENT OF FACTS.

The respective parties hereto, by their attorneys, agree for the purposes of this trial, that the following are the facts which exist and would be proved in this cause, were witnesses called for the purpose of making proofs, to wit:

1. That said defendants were, on January 1st, 1886, and have ever since that date continued to be partners in business at Kahului, in the Island of Maui, under the firm name of See Hop & Company.

2. That said defendants, on the dates hereinafter mentioned respectively, loaned and advanced to one Afu (then conducting mercantile business at Wailuku, in said Island of Maui) the sums hereinafter respectively set forth, and took the promissory notes of said Afu, payable to their order as hereinafter set forth, to wit:

January 1st, 1886—\$400, taking two notes for \$200 each, payable at one and two months respectively, without grace, with interest.

March 31st, 1886—\$600, one note for said amount, payable one month from date, without grace, with interest.

3. That on or about the 26th of April, 1886, each of said notes being then unpaid, said defendants loaned and advanced to said Afu the further sum of \$178, upon the representation of said Afu that he was pressed by Messrs. Hyman Brothers for payment of a debt to them amounting to \$120, the balance of said sum of \$178 having been intended by the parties to bring

Afu's indebtedness to defendants (including interest on previous loans) to \$1200.

4. That Afu discharged said obligation to Hyman Brothers with the money so advanced by defendants.

5. That it was agreed between said defendants and Afu, at the time the last named loan was made (to wit, on or about April 26th, 1886), that Afu should secure defendants in the premises by giving them a mortgage of his stock-in-trade and store furniture at Wailuku; and that said parties came to Honolulu by the first conveyance thereafter, and had such a mortgage drawn and executed by Afu on May 1st, 1886.

6. That said parties then returned to Maui, when defendants placed Afu in charge of said mortgaged premises as their agent, under the terms of said mortgage (which is hereby referred to and made a part hereof), and that said Afu continued so in charge as salesman, and on June 17th, 1886, paid to defendants, as proceeds of sales of the property so mortgaged, the sum of \$236.90, which was then, and still is, the only payment or amount of money received by said defendants on account of said amounts so by them loaned and advanced as aforesaid, or any of them.

7. That on the 21st day of June, 1886, Messrs. Hoffschlaeger & Co., of Honolulu, petitioned this Honorable Court to have said Afu adjudged a bankrupt, and said Afu was so adjudged on, to wit, the 28th day of June, 1886.

8. The plaintiff was elected assignee of the estate of said Afu on July 13th, and qualified on July 14th, 1886.

9. The records in the cases of *Bankruptcy of Afu*, and *See Hop & Co. vs. J. H. Soper et al.*, are referred to, and made a part of this statement.

10. That plaintiff has, to wit, February 16, 1887, duly demanded payment of said sum of \$236.90 from said defendants.

The question is: can the plaintiff recover, in view of the foregoing facts, upon the pleadings herein, or whether defendants shall take judgment upon their set-off or counter-claim herein?

Honolulu, April 18, 1887.

DECISION OF McCULLY, J.

This case is submitted to the Court, the jury being waived, on an agreed statement of facts.

Upon consideration of them and of the records referred to, I think judgment should be for the plaintiff.

The finding of the Court in the case of *See Hop & Co. vs. Soper* (in Banco, January Term, 1887: see VII Hawn.) was, that the giving of the mortgage, found to be fraudulent, was in itself an act of bankruptcy. The payment of this amount (\$236.90) was directly in pursuance of the mortgage and the possession thereunder. This fact will distinguish this payment from payments which might be made by a person actually insolvent to creditors not colluding with him in a fraudulent transfer of his whole property. The diligence and assiduity of a creditor who secures payments from a debtor, who afterwards becomes bankrupt, is a different thing from the receipt of realizations from property transferred by fraud, which itself works bankruptcy.

I do not regard the payment of money under the former circumstances as such a "transfer of property" as contemplated by Section 14 of the Bankruptcy Act (1884); but the act in question is the payment of money received for property so transferred.

Judgment for the plaintiff.

Whiting & Creighton, for plaintiff.

Ashford & Ashford, for defendants.

May 7, 1887.

See *See Hop & Co. vs. Parke*, ante, 688.

THE HAWAIIAN GOVERNMENT *vs.* FRANK BROWN *et al.*
IN EQUITY. BEFORE JUDD, C.J.

APRIL, 1889.

Equity has concurrent jurisdiction with law in matters of account, where from their complexity and length Courts of Law are incompetent to examine them with necessary accuracy.

Plaintiff's claim for unpaid customs duties on liquor withdrawn from bond by defendant, held not to be so complicated that it could not be submitted to a jury.

Plaintiff held to have a plain and adequate remedy at law, by an action of Debt, or a submission to Referees, or a statutory action for Discovery.

The fact that defendant made an assignment for benefit of creditors, after this cause of action arose, does not give Equity jurisdiction: nor will it occasion a multiplicity of suits.

Demurrer sustained.

DECISION OF JUDD, C.J.

The bill in substance alleges that the defendant Brown has since May, 1882, imported quantities of spirituous liquors, and has also withdrawn from the Custom House liquors imported by others, upon which he has not paid the legal duties, and that the same are now due from him: that the liquors so imported and withdrawn are set forth in four exhibits annexed to the bill, but asks leave to produce the original books and records of the Custom House in proof that the defendant Brown secured the withdrawal of these liquors from the Customs without payment of duties, by the representation and pretense that they had been ordered for the private use of the King and the Diplomatic Representatives of divers foreign governments, who were entitled to be exempted from the obligation to pay duties: that these representations and pretenses were false in fact, and that said liquors have not been ordered by nor delivered to these exempted persons, but were placed on sale by defendant Brown: that none of these liquors were imported for the use of the Hawaiian

Government, or for the King and Queen, nor as naval stores for a foreign government, nor for the private use and consumption of foreign diplomatic representatives, and that the duties now due on the same and claimed by plaintiff are set forth in Exhibit E. That defendant Brown asserts that these liquors were withdrawn by him for the private use and consumption of His Majesty and certain diplomatic representatives, and that is the reason why he refuses to pay the duties on the same: that the claim of the plaintiff embraces a great number of items distributed over a period of about four years, with each item involving a consideration and comparison of several dates, and that the account herein is so extensive and complicated that a court of law would be incompetent to examine it with all necessary accuracy: that said Brown, being in insolvent circumstances, made a voluntary assignment of all his property to the defendants, Cartwright and Allen, to pay his debts; and that said assignees and trustees, having sold the property of Brown, refuse to admit the claim of the plaintiff, and threaten to distribute the assets of Brown's estate (which are not sufficient to pay his debts in full) among creditors to the exclusion of plaintiff's claim. That the books of said Brown are now in the custody of said trustees, and by reference to such books alone can it be ascertained whether any of the said liquors were in fact sold and delivered to the persons as by Brown claimed. That Brown and his trustees are liable to pay the duties on these liquors even if they were sold and delivered to His Majesty or any foreign diplomatic representative. The bill prays for an answer and for an account, for a decree for the plaintiff for the amount of duties, and that the trustees admit the claim of the plaintiff when established and pay the same in full, etc.

The defendants demur to the bill on the grounds (1) of a want of equity, and (2) that there is an ample remedy at law.

BY THE COURT.

I think the demurrer should be sustained. The cause of action is a claim of the Hawaiian Government against the defendant Brown for certain duties on certain spirituous liquors

imported into this Kingdom. That an action at law would lie therefor was settled in *Cleghorn vs. G. W. Macfarlane & Co.*, January, 1888. The peculiar features of this case which are urged as making it a proper case for Equity are that the accounts are extensive and complex and mutual. In Sec. 459 of Story's Eq. Jur., the general doctrine is laid down "that in matters of account growing out of privity of contract, Courts of Equity have general jurisdiction where there are mutual accounts (and *a fortiori* where these accounts are complicated), and also where the accounts are on one side, but a discovery is sought, and is material to the relief."

These accounts do not appear to me to be "mutual." They comprise the dealings of the defendant Brown with the Custom House, and all the records and vouchers for these transactions, comprising the charges for duties and the amounts paid by him, are in the possession of the plaintiff.

The discovery asked for is to obtain from the books of the defendant Brown information whether any of the liquors were sold and delivered to parties entitled to exemption from duties, and the bill demurs to this evidence by the averment that if they were so sold and delivered it would not relieve Brown from the liability to pay the duties.

Equity has concurrent jurisdiction with law in matters of account where from their complexity and length courts of law are incompetent to examine them with the necessary accuracy. Story, Sec. 451; *Seymour vs. Dock Co.*, 20 N. J. Eq. 407. But the accounts do not appear to me to be complicated. They are lengthy, it is true, but they could be submitted to a jury and the results reached by them without difficulty.

The object of the bill appears to be to recover compensation or damages, *i.e.*, to collect unpaid duties on imported liquors. Now, although Equity may decree compensation or damages, it is incidental to other relief sought by the bill, or where there is no adequate remedy at law, or where some peculiar equity intervenes. Story, Sec. 794. A strictly legal demand is not recoverable in Equity. *Foley vs. Hill*, 2 House of Lords Cas., 43.

I am of the opinion that the plaintiff has a plain and adequate remedy at law. He may even have the accounts put out to referees: see Sec. 841, Civil Code, Compiled Laws, page 240; and he may also have a discovery of the defendant Brown's books by resorting to the Statute in page 369 of the Compiled Laws, "the means of affording discovery to litigants."

The Attorney-General urges, however, that the Government would have to sue in *debt* for the duties on the liquors imported by Brown, and in *assumpsit* for duties on the liquors imported by others and by him taken out of bond.

I am not aware that the latter half of the proposition is true. Why would not debt lie where, by purchase of goods in bond, the purchaser becomes by completing the transaction at the Custom House the virtual importer, and assumes all the liabilities of the original importer?

The only question of difficulty in my mind is the assignment of the defendant Brown of his property since the cause of action arose. But this not infrequently happens. So does the intervening of death, bankruptcy, and many other contingencies often make the recovery of claims difficult. But I cannot see that this gives Equity jurisdiction.

The Attorney-General claims that he would be compelled, if he has to resort to law and recover a judgment against the defendant Brown, to proceed also against the assignees by way of injunction or otherwise to enforce the judgment against the assets in their hands; and urges that a ground of Equity jurisdiction is to prevent the multiplicity of suits.

I understand that the doctrine is, that Equity once having obtained jurisdiction for discovery, the Court will go on and give the party the proper relief, and not subject him to the expense and inconvenience of a double suit at law.

This is not the case before me.

I think, too, that much of the reasoning on which this rule was based falls to the ground since the statute, common in most countries, allows parties to testify and to be called as witnesses by the other side.

For all these reasons I sustain the demurrer, and dismiss the bill with costs.

C. W. Ashford (Attorney-General), for plaintiff.

Cecil Brown and *P. Neumann*, for defendant.

Honolulu, April 6, 1889.

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1. In complaint for arrest of debtor about to quit the Kingdom, an averment on information and belief, verified by oath, that defendant is about to quit the Kingdom, is sufficient: it is not necessary to add "with intent to evade payment of his debts." *In Re Congdon*, 633.
2. A seal is not necessary to validity of the bond on arrest. *Ib.*
3. Sailor was arrested, at Consul's request, for desertion: warrant was not served till vessel had gone to sea, so Consul requested sailor's discharge: held, the sailor must be released. *In Re James Brown*, 704.

ASSAULT, see CRIMINAL LAW, 13, 14.

ASSIGNMENT.

1. In suit by creditor against assignees for benefit of creditors, to compel accounting, all the creditors named in deed of assignment are necessary parties. *Waterhouse vs. Hitchcock*, 131.
2. Our bankrupt laws do not apply to voluntary assignments. *Adams vs. Bishop*, 116.

See CONTRACT, 2: MORTGAGE, 2: BANKRUPTCY: EQUITY, 21.

ASSUMPSIT, see PLEADING, 12.

ATTACHMENT.

1. In suit for damages caused by the procuring of an attachment on plaintiff's property, held, that the validity of the attachment could not be raised in the suit in which it was issued: for the jury could not in an action of assumpsit give damages for wrongful attachment. *Kerr vs. Hyman*, 300.
2. An execution is postponed to the lien of a prior attachment. *Holmes vs. Soper*, 564.

See GARNISHEE.

ATTORNEY-GENERAL.

1. The Attorney-General cannot enter a *nolle prosequi* except by leave of Court. *The King vs. Robertson*, 718.
2. The Court will not compel the Attorney-General to prosecute nor punish him for contempt if he declines: but it may refuse to consent to the entry of a *nolle prosequi*. *Ib.*

ATTORNEY AT LAW.

1. Attorney punished for obtaining fee for work not performed. *In Re Kelipio*, 111.
2. Attorney punished for neglecting to appear, and for taking all the money collected for a client. *In Re Keaweahunahala*, 112.
3. The Court suggests that attorneys be personally mulcted in costs, for loose pleading. *Palake vs. Paakaula*, 269.
4. Decree made by consent of counsel, without fraud or collusion, cannot be set aside. *Beckley vs. Afong*, 545.

ATTORNEY IN FACT, see BANKRUPTCY, 5: CORPORATION, 5: GARNISHEE, 6.

AUCTION.

1. Commissioner appointed by Probate Court to sell decedent's estate, is not obliged to hire a licensed auctioneer to conduct the sale, but may do it himself. *Adams vs. Parke*, 276.
2. The Court refuses to grant an injunction against such sale, on the prayer of the licensed auctioneers in Honolulu. *Ib.*

AWARD, see LAND.

BANKRUPTCY.

1. Provisions of our bankruptcy laws do not apply to voluntary assignments. *Adams vs. Bishop*, 116.
2. Transfer of sugar, made just before insolvency, held not in fraud of creditors. *Ib.*
3. In a proceeding of involuntary bankruptcy the Court can hear a plea of equitable estoppel. *Bkptcy. of Spencer*, 134.
4. Creditor's promise that he would not press debtor, held not to estop creditor from putting debtor into bankruptcy. *Ib.*
5. Bankrupt obtained consent of majority of creditors in this Kingdom to his discharge: held, foreign creditors, though represented here by power of attorney, could not vote. *Bkptcy. of Allen*, 146.
6. Escape of debtor from the Kingdom, to avoid arrest on criminal charge, held to be an act of bankruptcy. *Bkptcy. of Padeken*, 169.
7. Assignees can sue in Equity to set aside conveyance as in fraud of creditors. *Green vs. Asona*, 233.

8. Assignees need not aver that a minor's lands are needed to satisfy debts. *Ib.*
9. Landlord's claim for rent is a lien and has priority over ordinary debts. *Bkptcy. of Ching On*, 287.
10. Bankrupt, not assignee, is proper party to bring suit for damages in nature of malicious prosecution. *Kerr vs. Hyman*, 300, 308.
11. "Debts" defined. *Ib.*
12. Mortgage given two months before bankruptcy held not in fraud of creditors: mortgagee not having reasonable cause to believe mortgagor insolvent. *Bishop vs. Davies*, 520.
13. Chattel mortgage of trader's stock set aside as in fraud of creditors: mortgagee having reasonable cause to believe mortgagor insolvent. *Lenahan vs. Akana*, 538.
14. Action for damages caused by conversion of a trader's goods by a creditor, whereby trader was forced into bankruptcy, does not pass to assignee. *Austin vs. Michiels*, 595.
15. Though transfer of all a trader's stock is generally an act of bankruptcy, yet here the assignees, by admitting proof of claim and paying dividend, are precluded from contesting validity of the transfer. *Cartwright vs. Bishop*, 598.
16. Transfer of property, by an insolvent trader to a creditor who had reason to believe the insolvency, held in fraud of creditors and set aside. *Cartwright vs. Hoffnung*, 601.
17. Creditor who took possession of trader's stock under agreement, held liable to trader's assignee for goods bought by trader from outside parties. *Austin vs. Michiels*, 611.
18. Value of goods at date of conversion, as per inventory, less expenses of sale, is measure of damages. *Ib.*
19. Tenant, holding over after end of term, failed to pay rent, and landlord distrained and removed goods prior to tenant's bankruptcy: held, landlord was entitled to proceeds, as against tenant's assignee. *Parke vs. Robinson*, 666.
20. Bankruptcy of a party is no excuse for relief in equity, where there is a remedy at law on the same issue. *See Hop vs. Parke*, 688.
21. Pledge of stock as collateral security, held to vest only equitable title in pledgee: legal title remains in pledgor and passes to his assignee in bankruptcy. *Smith vs. Castle*, 697.
22. The Court having held that a chattel mortgage given by bankrupt was void as in fraud of creditors: held, that the assignee is entitled to recover from the mortgagee proceeds of goods sold by the bankrupt, covered by the mortgage. *Parke vs. See Hop*, 747.

See ASSIGNMENT, 1.

BETTERMENTS, see EMINENT DOMAIN.

BILL, see NEGOTIABLE INSTRUMENT.

BILL OF SALE, see SALE.

BOARD OF HEALTH, see QUARANTINE.

BOND. Seal is not necessary. *In Re Congdon*, 633.

BOOKS OF ACCOUNT, see CRIMINAL LAW, 19: EQUITY, 19.

BOUNDARY.

The Court declines to set aside certificate of Commissioner, it appearing that plaintiff had notice of proceedings and acquiesced in the boundary as found. *Greenwell vs. Paris*, 315.

BURIAL, see *Smith vs. Wilder*, 228.

CABINET, see GOVERNMENT.

CANCELLATION OF INSTRUMENTS, see DEED: EQUITY: FRAUD:
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CARGO, see MARITIME LAW.

CARRIER, see " "

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" " " 275: see *Haiku Co. vs. Fornander*, 533.

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McBryde vs. Kala, VI. 529: see *Brewer vs. Luce*, 554.
McKibbin vs. Spencer, III. 574: see *Cornwell vs. Fernandez*, 692.
Mills vs. Briggs, IV. 506: see *Hackfeld vs. Bal*, 365.
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Widemann vs. Minister Finance, III. 789: see *Alexander vs. Fornander*, 324.
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- CHAMBERLAIN, see KING, 7, 8.
 CHATTEL MORTGAGE, see MORTGAGE.
 CHILD, see PARENT AND CHILD.
 CHURCH.
1. Dedication by church of land for Royal Mausoleum ought not to be revoked or interfered with. *Smith vs. Wilder*, 228.
 2. A Mormon minister is a "clergyman," and exempt from personal taxes. *Kupau vs. Richards*, 245.

CIRCUIT COURT, see COURT.

CLERGYMAN, see CHURCH.

COLLATERAL SECURITY, see MORTGAGE: PLEDGE.

COLLISION, see MARITIME LAW, 12.

COMMISSIONERS OF CROWN LANDS, see LAND.

COMMON LAW.

1. Is not in force in this country unless specially adopted. *In Re Congdon*, 635: *The King vs. Robertson*, 718: see *In Re Apuna*, 732.

See EQUITY.

CONDITION.

In Restraint of Marriage, see *Long vs. Pfluger*, 72.

Against Alienation, see *Kahanaiiki vs. Kohala Co.*, 694.

CONSTITUTION, see STATUTE.

CONSTRUCTION, see DEED, CONTRACT, LAND, PROBATE LAW, STATUTES, TAX, WORDS.

CONSUL, see ADMIRALTY, 1: MARITIME LAW, 16.

CONTEMPT, see COURT, 9, 11.

CONTRACT.

1. A creditor's promise that he would not press his debtor for payment of a note, held not to be a new contract, but a *nudum pactum*: or if a contract, only executory. *Bankruptcy of Spencer*, 134.
2. Contract for planting and grinding sugarcane held assignable by either party. *Thompson vs. Halawa Sugar Co.*, 464.
3. Planting contracts construed. *Ib.*
4. Contract of sale of sugar plantation construed to mean that certain indebtedness should be assumed by the seller: and the buyer held entitled to recover back such amount paid by him. *Macfie vs. Hackfeld*, 558.
5. An agreement for use of telephones held to be a revocable license. *Waianae Co. vs. Telephone Co.*, 589.
6. Fraudulent interlineation in written contract, made by one of the parties after execution, renders contract void in toto. *Apona vs. Kamai*, 707.

See SUGAR PLANTING.

CORPORATION.

1. Where fraud is alleged in allotment of shares, the corporation is the proper party plaintiff. *Bell Telephone Co. vs. Oriental*, 393.

2. It appearing that shares held by defendant were not fraudulently obtained, the Court declines to order their cancellation. *Ib.*
3. Manager and part-owner of incorporated sugar plantation held to be a surety on a mortgage given by the corporation as security for advances: and entitled to compel the corporation to pay the debt or indemnify him. *Macfie vs. Kilauea Sugar Co.*, 440.
4. Corporation, grantee in deed, held to be a necessary party in suit to cancel deed: it is immaterial that it is a foreign corporation, not registered under our laws. *McKeague vs. Neisser*, 461.
5. It is not necessary that the filing of papers of a foreign corporation at the Interior Office should be done by a person holding a power of attorney. *McKeague vs. Neisser*, 516.

See SUGAR: GARNISHEE, 4: TAX, 16.

COSTS, see CRIMINAL LAW, 5.

COUNSEL, see ATTORNEY.

COURT.

- A. GENERAL JURISDICTION, 1 to 6.
- B. SUPREME COURT, 7 to 12.
- C. CIRCUIT COURTS, 13.
- D. POLICE AND DISTRICT COURTS, 14 to 22.
- E. COURT AND JURY, 23 to 26.

A. GENERAL JURISDICTION.

1. The words "Court" and "Judge" imply a Court of Record or a Judge thereof. *In Re Akana*, 254.
2. The powers conferred by the Statute of Interpleader are never given to courts of inferior jurisdiction. *Ib.*
3. A Court of Equity can enquire into jurisdiction of Court of Probate. *Adams vs. Parke*, 276.
4. A Court has authority to enforce its orders by officers of its own appointing. *Ib.*
5. Jurisdiction of Inferior Courts is never presumed. *Re Gip Ah Chan*, 39.
6. See ADMIRALTY: CRIMINAL LAW: EQUITY: PROBATE LAW.

B. SUPREME COURT.

7. Justice of Supreme Court, who has heard case in Intermediary Court, cannot hear the case again, jury waived, in the Supreme Court. *Hing Yee vs. Chung Wa*, 304.
8. An appeal lies to Supreme Court in Banco from a Circuit Judge in Probate. *Pupuka vs. Maiwela*, 367.
9. Relative rights and duties of the Court and the Attorney-General,

as to entry of *Nolle Prosequi*, and Contempt of Court, discussed. *The King vs. Robertson*, 718.

10. The Presiding Justice, in allowing indictments, has to some extent the functions of a Grand Jury. *Ib.*, 727.
11. Publisher of a newspaper fined for contempt, for an article reflecting on the Chief Justice. *In Re Lyons*, 452.
12. See *post*, 16, 25: TAX, 10: HABEAS CORPUS, 4: STATUTES, 4: RULES.

C. CIRCUIT COURTS.

13. See *ante*, 8.

D. POLICE AND DISTRICT COURTS.

14. Contract for personal services can be enforced by imprisonment only by force of the Master and Servant Act. *Re Gip Ah Chan*, 40.
15. Police Court summons, if no complaint is filed, should contain all that is essential to a complaint: but objections as to form must be made before trial in lower Court. *Larrisch vs. Schaefer*, 140.
16. Police Justice noted appeal as to Supreme Court. Persons in Court understood it to be to Intermediary Court: ordered certified to Intermediary Court. *Mikalemi vs. Jones*, 179.
17. The law of Interpleader does not apply to District and Police Justices. *In Re Akana*, 254.
18. If Police Justice has no jurisdiction, mandamus does not lie to compel him to certify up an appeal. *Ib.*
19. District Justices have jurisdiction of actions for summary possession of land only when relation of landlord and tenant exists. *In Re Hobron*, 407.
20. It appearing that Police Justice had jurisdiction, the Appellate Court declines to enquire whether he decided correctly. *Ib.*
21. District and Police Justices have no jurisdiction to try trespass *quare clausum fregit*, where the plea is *liberum tenementum*. *In Re Kameewi*, 542.
22. § 915, Civil Code, giving jurisdiction in civil cases under \$200, does not conflict with §1423, giving special jurisdiction over Masters and Servants. *Nakamura vs. Haalilio*, 656.

E. COURT AND JURY.

23. Juror leaned out of window of jury-room and spoke to officer guarding building: held, not such misconduct as to demand a new trial. *Kapohaku vs. Koa*, 326.
24. Affidavit of juror held admissible. *Ib.*
25. Defendant pleaded guilty before Police Justice and appealed to

Supreme Court for mitigation of sentence. Jury trial was had in Supreme Court without objection. Held, the Court will set the verdict aside on its own motion. *The King vs. Maikai*, 145.

26. Whether an alteration in a note is material, is a question of law: whether there is an alteration is a question of fact. *Pahukula vs. Parke*, 210.

CREDITOR, see BANKRUPTCY: DEBT: PARTNERSHIP: DEED, 4.

CRIMINAL LAW.

1. APPEAL. Defendant pleaded guilty before Police Justice, and appealed to Supreme Court for mitigation of sentence: jury trial was had in Supreme Court without objection: held, Court will set verdict aside on its own motion. *The King vs. Maikai*, 145.
2. ARREST. Deserter from vessel was arrested on warrant at Consul's request: warrant was not served till after ship had left port, and Consul requested the man's release: held, all proceedings under the warrant are terminated by Consul's last request, and the man must be released. *In Re James Brown*, 704.
3. ASSAULT, see *post*, 13, 14.
4. CONTINUANCE. Attorney-General cannot continue case without leave of Court. *The King vs. Robertson*, 726.
5. COSTS can be imposed as part of a sentence. *In Re Apuna*, 732.
6. FORGERY, see DEED, 3: PROBATE LAW, 1.
7. GAMING. Pak Kap Pio, a Chinese lottery is a game. *The King vs. Yeong Ting*, 576.
8. GAMING. Defendants were charged with gaming, and convicted of possession of gaming implements: conviction held illegal, as the two offenses are different. *In Re Ah Mook*, 664.
9. LIBEL. Demurrer sustained to indictment, because it failed to charge a libellous publication. *The King vs. Gibson*, 310.
10. LIBEL. It is libellous to say of a Government official that his conduct is Treason to the State. *Ib.*
11. MITTIMUS, under Master and Servant law, held illegal, for failure to name the master or to specify term of imprisonment. *In Re Gip Ah Chan*, 25.
12. MITTIMUS is a process, but not part of record: resort may be had to the record if mittimus is not full. *In Re Rhodus*, 343.
13. MITTIMUS for Assault with intent to Murder was defective, but it appearing from Marshal's return to writ of *Habeas Corpus* that the prisoner was held under a valid sentence, the writ is discharged. *Ib.*
14. MITTIMUS for Assault or Robbery: what it should contain. *Ib.*

15. MITTIMUS. Defendant was sentenced to pay fine and costs: the Marshal imprisoned him at hard labor: held, as the sentence and mittimus failed to order imprisonment in default of payment of fine, the prisoner must be discharged. *In Re Apuna*, 732.
 16. NOLLE PROSEQUI. Relative rights and duties of Court and Attorney-General: see *The King vs. Robertson*, 718.
 17. OBSCENE PUBLICATION. Obscene programme for coronation festivities was printed in an office of which defendant was manager: held, defendant's knowledge and intent were of the essence of the crime: and as he was not put on enquiry as to the contents of the paper, and was entirely ignorant thereof, he cannot be held criminally responsible. *The King vs. Grieve*, 740.
 18. ROBBERY, see *ante*, 14.
 19. SEARCH WARRANT cannot be issued to compel production of defendant's books of account to be used as evidence against him. *The King vs. Luce*, 684.
 20. SEARCH WARRANT. It is not correct practice to ask the Court to vacate its process before defendant is before the Court, and before the evidence is offered which is urged to have been illegally obtained. *Ib.*
 21. SENTENCE, see *ante* 1, 5, 8, 13, 15.
 22. TREASON, see *ante* 10.
- CROWN LANDS, see LAND.
- CURTESY, see HUSBAND AND WIFE, 10.
- CUSTOM, see LAND, 18.
- CUSTOMS DUTIES, see EQUITY, 19.

DAMAGES.

1. In actions for injuries to persons, jury may give vindictive damages; but in trespasses to property, unless there is special aggravation, measure of damages is actual compensation. *Bernard vs. Loo Ngawk*, 214.
 2. In suit for damages, in nature of malicious prosecution, plaintiff must aver malice and want of probable cause. *Kerr vs. Hyman*, 300.
 3. Plaintiff, not his assignee in bankruptcy, is proper person to bring suit. *Ib.*, and 308.
 4. Damages awarded for diversion of water from taro land. *Mele vs. Ahuna*, 346.
- See HORSE, 2, 3: MARITIME LAW: FISHERY, 4: EMINENT DOMAIN: INJUNCTION: TRESPASS: TROVER.

DEATH.

1. Action of Trespass *quare clausum fregit* abates on death of plaintiff. *Bishop vs. Lokana*, 556.

See PROBATE LAW.

DEBT AND DEBTOR, see ARREST: BANKRUPTCY: WORDS: PARTNERSHIP: EQUITY, 20.

DECREE, see EQUITY: PROBATE LAW.

DEDICATION, see CHURCH.

DEED.

1. Deed set aside for fraud of grantee. *Ainini vs. Kala*, 16: *Kapea vs. Moehonua*, 49: *Apahu vs. Feary*, 523: *Kekaha vs. Iaea*, 613.
2. The Court declines to set aside a deed and mortgage, there being no fraud proven, and the mortgagee having no notice of fraud, if there had been any. *Kanamu vs. Parke*, 91.
3. Deed held not to be a forgery. *Manuel vs. Pelani*, 97.
4. Deed by husband to wife set aside, as being in fraud of creditors. *McCully vs. Huddy*, 108.
5. A deed made by a testator, subsequent to his will, supersedes the will. *Kahoiwai vs. Paakuku*, 124.
6. Deed takes effect from delivery: if void then, is void always. *Naweli vs. Auld*, 297.
7. Deed admitted to probate as a will is conclusive unless probate is revoked. *Pupuka vs. Maiwela*, 367.
8. Corporation named as grantee is a necessary party in suit to cancel deed. *McKeague vs. Neisser*, 461.
9. It must be alleged that deed is in defendant's possession. *Ib.*
10. Recital in deed, informally drawn in Hawaiian, held to be covenant of warranty, but only as to the title recited in the deed, and not as to other and better titles. *Nakeu vs. Hiwauli*, 596.
11. Covenant of warranty in deed held to be warranty only of grantor's title, not of a perfect title. *Robello vs. Gerard*, 609.
12. Applications to set aside deeds should be discouraged, unless fraud is clear. *Leiau vs. Kalua*, 630.
13. Plaintiffs having failed to allege or prove that a deed was different from what grantor intended, Court declines to set it aside. *Ib.*

See TRUST, 6: LAND.

DEFENDANT, see PARTIES.

DEFENSE, see CONTRACT, 1: FRAUD, 7: TENDER: RELEASE: EQUITY, 17.

DEMURRER, see PLEADING.

DERELICT, see MARITIME LAW, 7: WOOD.

DESCENT, see LAND: PROBATE LAW.

DESERTER, see MARITIME LAW, 16: MASTER AND SERVANT.

DEVIATION, see MARITIME LAW, 4.

DISCOVERY, see EQUITY, 20.

DISCRETION, see MANDAMUS.

DISTRESS, see LANDLORD AND TENANT, 4, 6, 11.

DISTRICT COURT, see COURT.

DOWER, see HUSBAND AND WIFE, 3, 16.

DUTIES, see EQUITY, 19.

EJECTMENT, see LAND.

ELECTIONS.

1. Delinquent taxpayer held "qualified to vote," and mandamus issued to compel Inspectors to give him a certificate. *Thompson vs. Montgomery*, 21.
2. Inspectors of Elections may be compelled by mandamus to put voter's name on list. *Kaili vs. Inspectors*, 668.
3. In petition by voter for mandamus, he must state his title to right claimed. *Ib.*

EMINENT DOMAIN.

1. Where a statute confers on the Government the right to take private property for public use, every form and particular required by the statute must be complied with. *In Re Fort Street*, 638.
2. Award of commissioners set aside for failure to comply with statute. *Ib.*

See LANDLORD AND TENANT, 9.

EQUITY.

1. Courts of Equity have no more discretionary powers than Courts of Law, but decide cases on principles as fixed and certain as those of common law. *Ainini vs. Kala*, 16.
2. Jurisdiction over dealings of persons standing in fiduciary or confidential relations to each other. *Kapea vs. Moehonua*, 51.
3. All persons interested in suit should be made parties. *Kaopua vs. Keelikolani*, 123.
4. Court will not take jurisdiction where it cannot proceed to final judgment. *Ib.*
5. In suit by creditor, against assignees for benefit of creditors, for accounting, all creditors named in deed of assignment are necessary parties. *Waterhouse vs. Hitchcock*, 131.

6. Equity has jurisdiction of suit to rescind contract of sale of vessel, on ground of fraud, and for accounting. *Chave vs. Dowsett*, 221.
7. Equity can decree conveyance of minor's interest in land, where conveyance to the minor was fraudulent. *Green vs. Asiona*, 233.
8. Assignees in bankruptcy, suing to set aside conveyance as in fraud of creditors, have not a plain and adequate remedy at law. *Ib.*
9. Court of Equity can enquire into jurisdiction of Court of Probate. *Adams vs. Parke*, 276.
10. In regard to the matters enumerated on page 389, Compiled Laws, as being within Equity jurisdiction, there is not a plain and adequate remedy at common law. *Asing vs. Aiona*, 281.
11. In suit for dissolution of partnership plaintiff need not allege that he has not a remedy at common law, nor that an accounting will show balance in his favor. *Ib.*
12. Equity has jurisdiction of bill for dissolution of partnership. *Lam Chock vs. Chun Wa*, 305.
13. Lessees of a sea fishery held not entitled to an injunction against fishing and trespass: no irreparable damage being shown, and there being an adequate remedy at law. *Shipman vs. Crown Land Commissioners*, 351.
14. Equity will in proper cases set aside a judgment at law: but in this case the alleged fraud could have been set up in the action at law: demurrer sustained. *Hackfeld vs. Bal*, 364.
15. Equity can relieve against forfeiture of land by landlord for non-payment of rent, and the tenant has not a plain and adequate remedy at law. *Garrett vs. Macfarlane*, 435.
16. Mortgage having been declared invalid, the debt for which it was security stands on its common law footing, and cannot be enforced in Equity. *Wilder vs. Roland*, 647.
17. Equity can interfere with a judgment at law only where complainant has equitable defense, or legal defense of which he could not avail himself owing to fraud or accident. *See Hop vs. Parke*, 688.
18. Equitable title of pledgee in pledge cannot be tried in action of replevin. *Smith vs. Castle*, 697.
19. Equity has concurrent jurisdiction with law in matters of complex accounts: but a claim for unpaid customs duties is not too complex to submit to a jury. *Hawaiian Gov't vs. Brown*, 750.
20. Plaintiff held to have plain and adequate remedy at law, by action of Debt, or submission to Referees, or statutory action for Discovery. *Ib.*
21. Fact that defendant made an assignment for benefit of creditors,

does not give Equity jurisdiction, nor will it occasion a multiplicity of suits. *Ib.*

See DEED: ESTOPPEL: FRAUD: HUSBAND AND WIFE: INJUNCTION: LAND: LANDLORD AND TENANT: MISTAKE: MORTGAGE: PARTIES: PLEADING: SPECIFIC PERFORMANCE: STATUTE OF FRAUDS: TRUST.

ESTATE, see PROBATE LAW.

ESTOPPEL.

1. In statutory proceeding of involuntary bankruptcy, the Court has jurisdiction to hear plea of equitable estoppel. *Bankruptcy of Spencer*, 134.
2. Creditor's promise that he would not press the debtor, held not to estop creditor from putting debtor into bankruptcy. *Ib.*
3. Plaintiff, who made improvements on another's land, with the knowledge of the owner, who did not object, cannot recover their value. *Waiaha vs. Naholowaa*, 271.
4. Plaintiff held estopped by his conduct from disputing regularity of proceedings before a Boundary Commissioner. *Greenwell vs. Paris*, 315.
5. Assignees in bankruptcy, by admitting proof of claim and paying dividend, held precluded from contesting validity of mortgage. *Cartwright vs. Bishop*, 598.
6. Devisee held not estopped by his conduct from claiming an estate in fee. *Kahanaiki vs. Kohala Co.*, 694.

See WAIVER.

EVIDENCE.

1. Absolute bill of sale of vessel cannot be varied by parol evidence. *Dowsett vs. Smith*, 60.
2. Evidence tending to defeat a sealed instrument is not admissible in actions at law. *Manuel vs. Pelani*, 97.
3. Parol contemporaneous evidence, to explain patent ambiguity in lease, admitted, to place the Court as nearly as possible in situation of the parties. *Kaehukukona vs. Ahuna*, 192.

See NEGOTIABLE INSTRUMENT, 3, 4: CRIMINAL LAW, 19, 20: LAND, 13, 18, 22, 24, 36: NEW TRIAL: PLEADING, 5: PROBATE LAW, 1, 5.

EXECUTION.

1. Marshal read execution to defendant, but did not take possession of property, or make inventory: garnishee process in another suit was subsequently served on defendant: held, there was no levy of execution, and the garnishment was good. *Everett vs. Bolles*, 153.

2. Law of 1876, as to Interpleader, does not apply to District and Police Magistrates. *In Re Akana*, 254.
3. An execution is postponed to lien of a prior attachment. *Holmes vs. Soper*, 564.

See ATTACHMENT: GARNISHEE.

EXECUTOR, see PROBATE LAW.

EXTRAORDINARY REMEDY, see MANDAMUS.

FENCE.

1. Plaintiff cannot recover damages for injury to his fence by horses tied to it by defendant, in an action under the statute for impounding. *Alok vs. Gerke*, 569.
2. An ordinary action of trespass would lie. *Ib.*

FISHERY.

1. Rights appurtenant to an Ili held to belong to defendant. *Judd vs. Kuanalewa*, 329.
2. Every resident on a land has the right to fish in the sea appurtenant to the land, and to sell the fish caught by him. *Hatton vs. Piopio*, 334.
3. Fish are animals *ferae naturae*. *Ib.*
4. Lessees of a sea fishery held not entitled to an injunction against trespass and fishing by defendants: no irreparable damage to fishery being shown, and there being an adequate remedy at law. *Shipman vs. Crown Land Comms.*, 351.
5. Action of trespass for breaking and entering a fishery, abates on death of plaintiff. *Bishop vs. Lokana*, 556.

FIXTURE.

1. Custom of natives in former times to remove houses does not make a house personal property. *Kahinu vs. Aea*, 68.
2. Houses built by husband of tenant in fee are fixtures. *Adams vs. Kauwa*, 280.
3. House resting on stones is not a fixture. *Ib.*
4. House built by father on son's land is not a fixture. *Ib.*

FRANCHISE.

1. The Minister of Interior has no power to grant a franchise for a tramway; the right rests entirely with the Legislature. *Gulick vs. Flowerdew*, 414.

FRAUD.

1. Deed set aside for fraud of grantee. *Ainini vs. Kala*, 16: *Kapea vs. Moehonua*, 49: *Apahu vs. Feary*, 523: *Kekaha vs. Iaea*, 613.
2. Court declines to set aside deed and mortgage, no fraud being proven. *Kanamu vs. Parke*, 91.

3. Deed by husband to wife, set aside as in fraud of creditors. *McCully vs. Huddy*, 108.
 4. Plaintiff failing to prove that a deed was different from what grantor intended, Court declines to set it aside. *Leiau vs. Kalua*, 630.
 5. Fraud against Creditors: see BANKRUPTCY, 2, 7, 12, 13, 16, 22.
 6. Husband held to have resulting trust in wife's land, because her name was fraudulently inserted in Royal Patent. *Kaiawahakena vs. Makapu*, 188.
 7. Plaintiffs seek to set aside judgment because an accord and satisfaction pleaded against them was obtained by fraud: demurrer sustained, for plaintiffs' failure to set up the fraud as part of their case in the action at law. *Hackfeld vs. Bal*, 364.
 8. Sale of a sugar plantation set aside, the grantor being of weak mind and imposed upon by the grantee. *McKeague vs. Neisser*, 498.
 9. Fraudulent interlineation in contract held to render it void in toto. *Apona vs. Kamai*, 707.
- See SALE, 1: MARITIME LAW, 8: TRUST, 6: CORPORATION, 1, 2: PROBATE LAW, 13, 14, 21.

GAMING, see CRIMINAL LAW, 7, 8.

GARNISHEE.

1. A garnishee process held good as against a preceding execution on which levy had not been made. *Everett vs. Bolles*, 153.
2. Judgment debtor can be held as garnishee of judgment creditor. *Ib.*
3. Debtor to partnership cannot be held as garnishee of one of the partners. *Ib.*: see also, *Bishop vs. Everett*, 157.
4. Service on manager of corporation, at its office, the president being out of the country, is service on the corporation. *Lishman vs. Giles*, 259.
5. Property in hands of a third party cannot be attached in aid of a judgment: but only "debts" due by a garnishee to defendant. *Lee Ah Sue vs. Chu Kee*, 623.
6. Garnishee process against W. who was out of the Kingdom, was served on his attorney in fact: held, not a proper service. *Hackfeld vs. Kavanagh*, 659.

See ATTACHMENT: EXECUTION.

GOVERNMENT, see CRIMINAL LAW, 10: KING: MINISTER OF INTERIOR: WATER, 5: EMINENT DOMAIN: LAND: ATTORNEY-GENERAL.

GRAND JURY, see COURT, 10.

GRANT, see LAND.

GUARDIAN AND WARD, see PROBATE LAW.

HABEAS CORPUS.

1. The only facts to be considered are those disclosed by the return. *In Re Gip Ah Chan*, 25.
2. Constitutionality of a statute may be decided when necessarily raised on *habeas corpus*. *Ib.*
3. Although a mittimus was defective, yet it appearing from the Marshal's return that prisoner is held under a valid sentence, the writ is discharged. *In Re Rhodus*, 343.
4. A Justice of the Supreme Court may, on *habeas corpus*, review the act of another Justice in allowing arrest of a party, but the best course is to apply to the Justice who issued the writ, on a motion to discharge the writ. *In Re Congdon*, 633.
5. Rights of persons under *Habeas Corpus* are fully secured by our law. *In Re Apuna*, 732.
6. Prisoner discharged because mittimus failed to order imprisonment at hard labor, in default of paying fine. *Ib.*

See CRIMINAL LAW: ARREST.

HEIR, see PROBATE LAW.

HORSE.

1. Warranty that horse is fit to drive in milk wagon does not include his fitness for express wagon. *Puhalahua vs. Pederoza*, 241.
2. Plaintiff having had horse on trial, is not liable for direct or consequential damage. *Ib.*
3. Plaintiffs, on country road, left their horses by roadside while they went into restaurant: defendant impounded the horses, because they were tied to his fence and had pulled off the rails: held, the horses were not estrays, and not liable to be impounded: and damages for injury to fence could not be recovered in statutory action for impounding. *Alok vs. Gerke*, 569.

HOUSE, see FIXTURE.

HUSBAND AND WIFE.

1. Wife cannot convey her lands to her husband during coverture. *Cummins vs. Wond*, 69.
2. Condition in restraint of marriage, in trust deed, held void. *Long vs. Pfluger*, 72.
3. Widow's claim of dower held repugnant to provisions of trust deed made for her benefit, she having failed to elect between deed and dower. *Ib.*

4. Trust deed held terminated by marriage of widow for whose benefit it was made. *Ib.*
5. Son by former marriage held to have no title under trust deed made for benefit of second wife and her children. *Ib.*
6. Deed by husband to wife set aside as in fraud of creditors. *McCully vs. Huddy*, 108.
7. Husband, living apart from his wife, assented to cultivation of wife's land by a tenant: held, the tenant has reasonable time to harvest his crop. *Aho vs. Ahuna*, 150.
8. Husband held to have resulting trust in wife's land, purchased with his money. *Kaiawahakena vs. Makapuu*, 188.
9. If credit for necessities is given solely to wife, husband is not liable. *Kupele vs. Kahananui*, 212.
10. Wife was under legal age at her marriage, and died before she reached legal age: held, the marriage was not void but voidable, and voidability ceased on wife's death: the husband is therefore entitled to all his rights in wife's estate. *Estate of Gordon*, 289.
11. Wife cannot alienate her property without husband's consent: and subsequent death of the husband cannot validate such a conveyance. *Naweli vs. Auld*, 297.
12. Presumption in favor of legitimacy of children, though adultery be proven, held to apply to ancient times before marriage was introduced. *Estate of Moehonua*, 338.
13. Claim of heirship, based on affiliation by a chief of a child whose mother consorted with another man as her kane, disallowed. *Ib.*
14. A trust deed expressed that the property conveyed was for wife's separate use, and was not to be mortgaged: husband and wife mortgaged the property to secure debt for lumber to repair family dwelling: held, the mortgage was invalid. *Wilder vs. Roland*, 647.
15. The debt was the husband's: he was bound to provide shelter for the wife. *Ib.*
16. Widow may be barred of dower by adverse possession of heir or devisee of husband, but her ouster must be shown. *Makauhana vs. Pua*, 651.
17. Devise by husband to wife of all his property, to go to their children at her death, held not to come within Rule in Shelley's Case, and to give wife only a life estate. *Chillingworth vs. Lindsey*, 692.

See PARENT AND CHILD.

ILI, see LAND.

IMPOUNDING, see *Alok vs. Gerke*, 569.

IN PERSONAM AND IN REM, see ADMIRALTY: TAX, 6.

INFANT, see PARENT AND CHILD: HUSBAND AND WIFE: PROBATE LAW.

INJUNCTION.

1. The Court declines to grant an injunction, on the petition of the licensed auctioneers of Honolulu, against a sale at auction by an unlicensed person. *Adams vs. Parke*, 276.
2. Lessees of a sea fishery held not entitled to injunction against trespass and fishing by defendants. *Shipman vs. Crown Land Comm'rs*, 351.
3. Injunction granted against laying of tramways in Honolulu, it appearing that the company had a franchise from the Minister of the Interior only. *Gulick vs. Flowerdew*, 414.
4. Injunction will not lie to restrain suits in law and equity on mere apprehension that such suits will be brought. *Thompson vs. Halawa S. Co.*, 464.
5. Court declines to enjoin proceedings in an ejectment suit, for although the plaintiff therein had long delayed bringing suit, his right could only be barred by full running of the statutory period of 20 years. *Pahuilima vs. Kela*, 573.
6. Temporary injunction granted against the ejectment suit, to allow settlement of a question in the Probate Court. *Ib.*
7. Equity may enforce by injunction the negative part of an agreement, although the affirmative part cannot be specifically enforced by decree. *Waianae Co. vs. Bell Co.*, 589.
8. Demurrer sustained for lack of allegation of irreparable injury. *Ib.*
9. Agreement for use of telephones held to be a revocable license: and injunction against removal of telephones refused. *Ib.*
10. Plaintiff avers that defendant claims title under an alleged lease, and prays that he be enjoined from trespassing: demurrer sustained, because it is not alleged that any trespass is threatened, or that if committed it would carry irreparable injury to plaintiff. *Cornwell vs. Fernandez*, 691.

See EQUITY.

INSOLVENCY, see ASSIGNMENT: BANKRUPTCY.

INTENT, see CRIMINAL LAW.

INTEREST, see MORTGAGE, 5, 10.

INTERMEDIARY COURT, see COURT.

INTERPLEADER, see *In Re Akana*, 254: *Cartwright vs. Hoffnung*, 601.

IRRIGATION, see WATER.

JUDGE, see COURT.

JUDGMENT, see LAND, 31: EQUITY, 14, 17.

JURAT, see ACKNOWLEDGMENT: AFFIDAVIT.

JURISDICTION, see COURT: EQUITY: PROBATE: ADMIRALTY:
CRIMINAL LAW.

JURY, see COURT.

JUSTICE, see COURT.

KING.

1. Release by Mahele from King to Queen is good. *Harris vs. Carter*, 195.
2. King did not have to go to Land Commission for confirmation of title in his reserved lands. *Ib.*
3. Although there is no prescription against the State, the King, as an individual, cannot claim the immunity. *Ib.*
4. Affidavits of King and Queen held not necessary, their high position being sufficient assurance of reality of the proofs offered. *Kaupono vs. Naoho*, 350.
5. Lunalilo's Mausoleum, see *Smith vs. Wilder*, 228.
6. Crown Lands, see LAND.
7. The office of Chamberlain is personal to His Majesty, and consent of the Cabinet to the appointment is not required. *Macfarlane vs. Green*, 711.
8. Plaintiff held not entitled to Chamberlain's salary while absent from the Kingdom. *Ib.*

KONOHIKI, see LAND: FISHERY: LANDLORD AND TENANT.

KULEANA, " " " " " "

LABOR CONTRACT, see MASTER AND SERVANT.

LACHES, see LAND, 25, 29, 35.

LAND.

- A. CROWN LANDS, 1 to 4.
- B. AWARDS AND PATENTS, 5 to 15.
- C. EJECTMENT, 16 to 37.
- D. VENDOR AND VENDEE, 38 to 40.
- E. MISCELLANEOUS, 41 to 44.

A. CROWN LANDS.

1. Plaintiff held entitled to lands as being the King's private property and not Crown Lands. *Keelikolani vs. Crown Land Comm'rs*, 446: *Kaleleonalani vs. Crown Land Comm'rs*, 454.

2. Conveyance by plaintiff of all her interest in Crown Lands, held not to include the land in question. *Ib. Ib.*
3. Defendants were decreed to be owners of premises formerly supposed to be Crown Lands: a former mortgage on the land had been paid out of the Treasury, under the supposition that it was Crown Land: held, the Minister of Finance has a lien on the property to the extent of its value at the time the mortgage was released. *Kapena vs. Kaleleonalani*, 579.
4. The Commissioners of Crown Lands are not necessary parties defendant. *Ib.*

B. AWARDS AND PATENTS.

5. The Mahele of 1848, and Hawaiian land titles, discussed and defined. *Kenoa vs. Meek*, 63: *Harris vs. Carter*, 195.
6. The Mahele did not give a title: a subsequent Award was necessary. *Kenoa vs. Meek*, 63.
7. A grantee under the Mahele, who failed to perfect his title, is barred from asserting it. *Ib.*
8. *Ahupuaa*, *Ili*, and *Ili Kuponos*, defined. *Harris vs. Carter*, 195.
9. The *Ilis* in the Mahele being *Ili Kuponos*, were not included in grants of the *Ahupuaas* within whose boundaries they lie. *Ib.*
10. A Land Commission Award, made later than a will alleged to be lost, is conclusive against the right to prove the will. *Estate of Kekauluohi*, 172.
11. Such Award was a judgment of a Court of competent jurisdiction. *Ib.*
12. The Court declines to set aside a Royal Patent issued on a Certificate of Boundaries: it appearing that it was issued merely to give metes and bounds, the title having passed by a former patent. *Greenwell vs. Paris*, 315.
13. Fact of defendant taking out Royal Patent for land in plaintiff's name, held not an admission of plaintiff's title. *Paulo vs. Malo*, 390.
14. The King did not have to go to the Land Commission for confirmation of his title in his reserved lands. *Harris vs. Carter*, 195.
15. Husband held to have resulting trust in wife's land, because her name was fraudulently inserted in Royal Patent. *Kaiawahakena vs. Makapu*, 188.

C. EJECTMENT.

16. Decree of Probate Court is no bar to adverse claim by party who had not proper notice to appear. *Mikalemi vs. Luau*, 47.

17. Conflicting claims of heirship considered, and half the land awarded to each claimant. *Ib.*
18. Custom of natives in former times to remove houses, does not make a house personal property. *Kahinu vs. Aea*, 68.
19. No right to bring suit accrues to plaintiff, unless defendant's possession is adverse. *Kahukuleionohi vs. Kaikainahaole*, 183.
20. After discharge of administrator, his possession becomes adverse to heirs. *Ib.*
21. A crop of taro apportioned, after judgment in ejectment. *Adams vs. Kauwa*, 280.
22. Defense of adverse possession held not proven. *Judd vs. Kuanalewa*, 329.
23. More liberality should be exercised in granting new trial in ejectment, than in other cases. *Kaupono vs. Naoho*, 350.
24. Adverse possession held proven by cultivation of land and payment of taxes. *Paulo vs. Malo*, 390.
25. Cousins of the whole and half blood held to have title to land, in spite of their failure to assert it for a long time. *Kahuaku vs. Union Mill*, 487.
26. Defendants having acquired possession without notice of plaintiff's claim, nominal damages awarded. *Ib.*
27. Defendant held not liable for mesne profits taken prior to his entry by those under whom he claims. *Keliikanakaole vs. Hopkins*, 516.
28. Although there is no prescription against the State, the King, as an individual, cannot claim this immunity. *Harris vs. Carter*, 195.
29. Court of Equity declines to enjoin proceedings in ejectment, for although plaintiff therein had long delayed bringing suit, with full knowledge of his rights, yet his right to recover was a legal one, and could only be barred by full running of the statutory period of 20 years. *Pahuilima vs. Kela*, 573.
30. Temporary injunction granted against the ejectment suit, to allow settlement of question in Probate Court. *Ib.*
31. Judgment may be rendered severally against defendants for land held by each, though they were sued jointly. *Ching On vs. Amana*, 625.
32. Widow may be barred of dower by adverse possession of heir or devisee of her husband, but her ouster must be shown. *Makauhana vs. Pua*, 651.
33. Estate in fee held to be created by devise: and a condition against alienation held void. *Kahanaiki vs. Kohala Sugar Co.*, 694.

34. Devisee held not estopped by conduct from claiming estate in fee. *Ib.*
35. Long acquiescence in adverse possession, though not a bar till after 20 years, held to be significant. *Kanaloa vs. Quinn*, 700.
36. Plaintiffs held not to have sustained the burden cast on them of proving their title. *Ib.*
37. See REAL PROPERTY: DEED: PARENT AND CHILD, 8.

D. VENDOR AND VENDEE.

38. Vendee at administrator's sale of real estate, by order of Probate Court, held to be a *bona fide* purchaser without notice as against the claim of an heir to the estate that the sale was in fraud of her rights. *Beckley vs. Afong*, 545.
39. Vendor has no lien for unpaid purchase price, as against vendee and a subsequent purchaser with notice. *Kainapau vs. Kukii*, 566.
40. See DEED: SPECIFIC PERFORMANCE: PROBATE LAW, 18.

E. MISCELLANEOUS.

41. Cloud on Title, see LANDLORD AND TENANT, 12.
42. Rule in Shelley's Case, see *Chillingworth vs. Lindsey*, 692.
43. Dower and Curtesy, see PROBATE LAW.
44. For the following subjects, see their titles: BOUNDARY: DEED: EMINENT DOMAIN: FIXTURE: LANDLORD AND TENANT: MORTGAGE: REAL PROPERTY: RECORDED INSTRUMENT: REMAINDER: STATUTE OF LIMITATIONS: TRESPASS.

LAND COMMISSION, see LAND.

LANDLORD AND TENANT.

1. An agreement containing "apt words of present demise," held to be a lease, and not void for uncertainty. *Larrisch vs. Schaefer*, 140.
2. Occupation and payment of rent by lessee after end of term, held to be virtual notice of his intention to renew. *Ib.*
3. Husband, living apart from his wife, assented to cultivation of wife's land by a tenant: held, the tenant has reasonable time to harvest his crop. *Aho vs. Ahuna*, 150.
4. Landlord's claim for rent is a lien on a bankrupt estate, and has priority over ordinary debts. *Blkptcy. of Ching On*, 287.
5. District and Police Justices have jurisdiction over actions for summary possession of land only when relation of landlord and tenant exists. *In Re Hobron*, 407.

6. Equity can relieve against forfeiture of land by landlord for non-payment of rent. *Garrett vs. Macfarlane*, 435.
7. Tenant by curtesy can lease land inherited by his children from their mother, till the children are of age. *Hanuna vs. Unna*, 485.
8. A notice to quit must be given on the children's majority. *Ib.*
9. Plaintiff in equity alleged eviction from leased premises by the Government, under alleged right of eminent domain: held, on demurrer, that the allegation was sufficient, and whether the Government took legal steps in eviction is a matter of proof. *Yim Quon vs. Cartwright*, 653.
10. Plaintiff is entitled to apportionment of rent, unless he has deprived himself of it by his conduct or neglect. *Ib.*
11. Tenant, holding over after end of term, failed to pay rent, and landlord distrained and removed goods, prior to tenant's bankruptcy: held, landlord was entitled to proceeds as against tenant's assignee in bankruptcy. *Parke vs. Robinson*, 666.
12. Plaintiff in equity asks for cancellation of a lease held by defendant, because it is a cloud on plaintiff's title: demurrer sustained, for lack of sufficient allegations in the bill. *Cornwell vs. Fernandez*, 691.

See FISHERY: WOOD.

LAW, see COMMON LAW: STATUTES.

LEASE, see LANDLORD AND TENANT.

LEGISLATURE, see FRANCHISE.

LIBEL, see CRIMINAL LAW, 9, 10.

LICENSE, see CONTRACT, 5: AUCTION.

LIEN, see BANKRUPTCY, 9: ATTACHMENT, 2: LAND, 3, 39: MORTGAGE, 15.

LIMITATIONS, see STATUTE OF LIMITATIONS.

LOST PROPERTY, see PROBATE LAW, 5: WOOD.

LOTTERY, see CRIMINAL LAW, 7.

LUNALILO'S TOMB, see *Smith vs. Wilder*, 228.

MAHELE, see LAND.

MALICIOUS PROSECUTION.

1. In suit for damages, in nature of malicious prosecution, plaintiff must aver malice and want of probable cause. *Kerr vs. Hyman*, 300, 308.
2. Plaintiff, not his assignee in bankruptcy, should bring suit. *Ib.*

3. Complaint held to sufficiently traverse facts which led to prosecution. *Ib. Ib.*

MANDAMUS AND PROHIBITION.

1. Delinquent tax-payer held "qualified to vote," and mandamus issued to compel granting of certificate by Inspectors. *Thompson vs. Montgomery*, 21.
2. Inspectors of Election can be compelled by Mandamus to place voter's name on list. *Kaili vs. Inspectors*, 668.
3. Voter must state in petition his title to right claimed. *Ib.*
4. Applications for extraordinary remedies must be perfect in first instance, and amendments cannot be allowed. *Ib.*
5. Mandamus issued to compel Tax Assessor to grant certificate of appeal. *In Re Richardson*, 216; *Aikoe vs. Hayselden*, 534.
6. It appearing that a Police Justice had jurisdiction, Supreme Court declines to enquire whether he decided correctly on the evidence: and orders writ of Prohibition dissolved. *In Re Hobron*, 407.
7. If Police Justice has no jurisdiction, Mandamus does not lie to compel him to certify up an appeal. *In Re Akana*, 254.
8. Writ of Prohibition granted against trial of Trespass *quare clausum* by District Justice. *In Re Kameeui*, 542.
9. Allegation in respondent's return held not sufficient denial of averment in petition. *Macfarlane vs. Green*, 711.
10. Court declines to issue writ to compel Minister of Finance to pay Chamberlain's salary. *Ib.*

See APPEAL, 1: WATER, 4.

MARITIME LAW.

1. In a suit by sailor against captain, for flogging, relative duties of master and crew considered and defined. *Sampson vs. Pease*, 2.
2. Absolute bill of sale of vessel cannot be varied by purchaser by parol evidence that transfer was merely as security for advances. *Dowsett vs. Smith*, 60.
3. Steamer held not liable for clandestinely bringing smallpox into the Kingdom, contrary to §295 Civil Code. *Hutchison vs. Stmr. Nebraska*, 100.
4. Seamen claim discharge and wages on account of deviation. The matter being within jurisdiction of American Consul, the Court declines jurisdiction. *Cudjero vs. Sea Breeze*, 127.
5. Part owners of a vessel are tenants in common. *Everett vs. Bolles*, 153.
6. Part owners of a vessel are partners. *Bishop vs. Everett*, 157.
7. Salvors allowed 1/3 of amount saved: it not being a case of derelict or extra-perilous service. *Wilder vs. Bk. Eskbank*, 219.

8. Equity has jurisdiction of suit to rescind contract of sale of vessel, on ground of fraud, and for accounting. *Chave vs. Dowsett*, 221.
9. Plaintiff held not deceived as to defendant's title, or if deceived, not to have been damaged. *Ib.*
10. Mortgagee of vessel, in possession, is not vested with legal title till foreclosure. *Ib.*
11. Damage to cargo, by rust, held to be a peril of the sea, and not due to bad stowage. *Brewer vs. Bk. Alster*, 251.
12. Collision at night between two schooners held caused by lack of look-out on one and absence of lights on the other: damages divided. *The Jennie Walker*, 403.
13. Burden is on carrier to show safe delivery of cargo or prove loss by excepted causes. *May vs. Schr. Sovereign*, 42.
14. Damage to cargo held caused by perils of sea. *Ib.*
15. Sugar was laden on a vessel at Honolulu, and bills of lading signed and mailed to foreign consignees: held, the sugar was still in shipper's possession, for purpose of taxation. *Brewer vs. Luce*, 554.
16. Sailor was arrested as deserter at Consul's request, but as warrant was not served till after vessel left port, Consul requested sailor's release. Held, sailor could only be held by virtue of Consul's request, and must therefore be released. *In Re James Brown*, 704.

See QUARANTINE.

MARRIAGE, see HUSBAND AND WIFE.

MARSHAL. Authority over prisoners. See *In Re Apuna*, 732.

MASTER AND CREW, see MARITIME LAW.

MASTER AND SERVANT.

1. Mittimus, ordering servant to return to master's service or be imprisoned, held illegal for not naming master or specifying term of imprisonment. *Gip Ah Chan*, 25.
2. Contract being assigned to parties not designated by name, and who cannot be ascertained precisely, is void. *Ib.*
3. Foreign corporation, that has failed to comply with our registration law, cannot bring suit against laborers for refusing duty. *Heeia Co. vs. Kahanamoku*, 385.
4. §915, Civil Code, giving District Judges jurisdiction of civil cases under \$200, does not conflict with §1423, giving special jurisdiction over masters and servants. *Nakamura vs. Haalilio*, 656.
5. The pendency of suit by servant for wages is no bar to an action by him to cancel the contract for master's breach. *Ib.*

MAUSOLEUM, see *Smith vs. Wilder*, 228.

MINISTER OF INTERIOR.

1. Minister of Interior has no right to custody of Lunalilo's tomb: it is not Government property, although the Legislature has appropriated salary for a custodian. *Smith vs. Wilder*, 228.
2. Minister of Interior, acting for the Government, may make reasonable rules for use of water from Honolulu Water Works: and deprive of his water privilege a party who breaks the rules. *Riemenschneider vs. Wilson*, 375.
3. Minister of Interior has no power to grant a franchise for a tramway in streets of Honolulu. *Gulick vs. Flowerdew*, 414.

See EMINENT DOMAIN.

MINOR, see PARENT AND CHILD: PROBATE LAW.

MISTAKE, see FRAUD: MORTGAGE, 11: TRUST, 6.

MITTIMUS, see CRIMINAL LAW, 11 to 15.

MORTGAGE.

1. The Court declines to set aside a mortgage made by a grantee of land, there being no proof of fraud by said grantee upon his grantor, and the mortgagee having no notice of fraud, if there had been any. *Kanamu vs. Parke*, 91.
2. Parol assignment of mortgage, accompanied by endorsement of note and delivery of mortgage deed, is valid. *Hackfeld vs. Akina*, 114.
3. Manager and part-owner of corporation held to be a surety on a mortgage given by the corporation, and entitled to compel the corporation to pay the debt or indemnify him. *Macfie vs. Kilauea Sugar Co.*, 440.
4. Mortgage given two months before mortgagor's bankruptcy held not in fraud of creditors, mortgagee not having reasonable cause to believe mortgagor insolvent. *Bishop vs. Davies*, 520.
5. Plaintiff held entitled to full interest, defense of tender not being made out. *Mersburgh vs. Renton*, 527.
6. Chattel mortgage of trader's stock held to be in fraud of creditors and set aside. *Lenahan vs. Akana*, 538.
7. Acknowledgment of chattel mortgage being defective, for notary's failure to comply with law, the mortgage was not entitled to be recorded, and the recording must be treated as a nullity. *Ib.*
8. There is a wide distinction between effect of record of chattel mortgage and one of real estate. *Ib.*
9. In action for foreclosure against several defendants, one of them cannot plead as a set-off his claim for damages against plaintiff for breach of contract. *Watson vs. Akanakili*, 570.

10. Mortgagee of sugar plantation, who had made entry and carried on the plantation, held entitled to allowance for advances, commissions and interest. *Ib.*
11. The Treasury having paid a mortgage on certain lands under the mistaken idea that they were Crown Lands; and defendants having been decreed to be the owners of said land: the Minister of Finance has a lien on the premises to the extent of its value at the time the mortgage was released. *Kapena vs. Kaleleonalani*, 579.
12. The devisee, not the personal representative, of a deceased owner, is the proper person to be sued. *Ib.*
13. Though mortgage of all a trader's stock is generally an act of bankruptcy, the assignees are precluded from contesting its validity in this case. *Cartwright vs. Bishop*, 598.
14. Trust deed expressed that property was for wife's separate use, and could not be mortgaged. Husband and wife mortgaged the property to secure debt for lumber: held, the mortgage was invalid, and plaintiff's claim cannot be enforced in Equity. *Wilder vs. Roland*, 647.
15. Receiver of sugar plantation held to have prior lien on receipts of plantation, but not on *corpus* of the property, as against mortgagees. *Unna vs. Brown*, 676.
16. Chattel mortgage by bankrupt having been held void: the assignee can recover from mortgagee proceeds of goods sold by bankrupt, covered by the mortgage. *Parke vs. See Hop*, 747.

See MARITIME LAW, 2, 10.

NEGOTIABLE INSTRUMENT.

1. A second note held to be a renewal, and not payment, of a former note. *McCully vs. Huddy*, 108.
2. A creditor's promise not to press his debtor for payment of a note, held not to be a new contract, but a *nudum pactum*: or if a contract, only executory. *Bankruptcy of Spencer*, 134.
3. Whether alteration in note is material, is question of law: whether there is an alteration, is question of fact. *Pahukula vs. Parke*, 210.
4. Maker of note may deny he has signed it: and evidence that he has been heard to deny it is admissible. *Ib.*
5. New partners, taken into firm after making of a firm-note, are not liable on the note, there being no proof of a new promise by them to pay it. *Chung Wa vs. Sing Kwong Wo Co.*, 552.

NEW TRIAL.

1. It must appear affirmatively that newly-discovered evidence is not cumulative. *Abela vs. Louika*, 57.

2. Affidavits as to subornation of opposing witnesses are regarded with great caution. *Ib.*
3. Introduction of unrecorded memorandum, contradicting recorded lease, held to be a surprise, and new trial ordered. *Davies vs. Hackfeld*, 181.
4. Motion for new trial may be made after 10 days, or after end of term, on ground of new evidence, if judgment has not been executed or status of parties changed. *Kahula vs. Kuamu*, 226.
5. Newly-discovered evidence being cumulative, new trial refused. *Kepola vs. Aholi*, 302.
6. A juror leaned out of window of jury-room and spoke to officer guarding the building: held, not such misconduct as to demand a new trial. *Kapohaku vs. Koa*, 326.
7. More liberality should be exercised in granting new trial in Ejectment, than in other cases. *Kaupono vs. Naoho*, 350.
8. New trial granted for newly discovered evidence. *Ib.*

NEWSPAPER.

Responsibility of publisher: see *In Re Lyons*, 452; *The King vs. Grieve*, 740.

NOLLE PROSEQUI, see CRIMINAL LAW, 16.

NOTARY PUBLIC, see RECORDED INSTRUMENT, 2.

NOTE, see NEGOTIABLE INSTRUMENT.

NOTICE, see PROBATE LAW, 13, 14, 29: DEED, 2: LANDLORD AND TENANT, 2: SPECIFIC PERFORMANCE, 1: BOUNDARY, 1: PLEDGE, 1: LAND, 26: TRUST, 7: RECORDED INSTRUMENT, 3.

NOVATION, see CONTRACT, 1: PARTNERSHIP, 6.

OBSCENITY, see CRIMINAL LAW, 17.

PARENT AND CHILD.

1. Equity can decree conveyance of minor's interest in land, where the conveyance to the minor was fraudulent. *Green vs. Asiona*, 233.
2. In absence of adoption in writing, held that parents who gave their child to other parties had not parted with their right of custody. *In Re Kamarawa*, 386.
3. The child being unwilling to return to her parents, it not being for her advantage to do so, and she being capable of exercising discretion, the Court declines to order her return. *Ib.*
4. Tenant by curtesy has right to lease land inherited by his children from their mother. *Hanuna vs. Unna*, 485.

5. Father, as such, cannot lease child's land. *Ib.*
6. Decree of Probate Court was made in 1859, ordering conveyance of minor's estate: a petition in 1884, by the minor, to set aside the decree, held not barred by statute of limitations, because she married before she became of age, and the disability of coverture was not removed till her husband's death in 1881. *Beckley vs. Afong*, 545.
7. The minor, being a trustee at the date of the decree of 1859, was not entitled to her day in Court, after her minority, to disaffirm. *Ib.*
8. Son held to have remainder after life estate of mother. *Zupplein vs. Austin*, 8.

See HUSBAND AND WIFE, 5, 12, 13, 17.

PAROL, see EVIDENCE: STATUTE OF FRAUDS.

PARTIES, see EQUITY, 3, 5: INTERPLEADER: INJUNCTION, 1: BANKRUPTCY, 10, 14: PLEADING, 7: CORPORATION, 1, 4: LAND, 4, 31: PROBATE LAW, 15, 16.

PARTNERSHIP.

1. Debtor to a partnership cannot be held as garnishee of one of the partners. *Everett vs. Bolles*, 156: *Bishop vs. Everett*, 157.
2. Part owners of a vessel held to be tenants in common. *Everett vs. Bolles*, 153.
3. Part owners of a vessel held to be partners. *Bishop vs. Everett*, 157.
4. Sale by a partner, of all the partnership property, dissolves the partnership. *Williams vs. Gulick*, 162.
5. Partnership held proved by circumstances, there being no written agreement: and an accounting ordered. *Jubey vs. Puni*, 369.
6. New partners, taken into a firm after making of a note by the firm, held not liable on the note, there being no proof of a new promise by them to pay it. *Chung Wa vs. Sing Kwong Wo Co.*, 552.
7. Partnership debts are joint and several: a creditor may proceed against estate of deceased partner, whether surviving partners are solvent or insolvent. *Estate of Unna*, 606.
8. Discharge of executors of deceased partner postponed till after the partnership has been wound up. *Ib.*
9. Release by creditor to administrator of deceased partner bars a further claim by creditor against the firm. *Aluna vs. Selig*, 661.
10. Manager of a partnership held entitled to wages from receiver. *Ib.*

See EQUITY, 11, 12: RECEIVER.

PASSENGER, see MARITIME LAW, 3: QUARANTINE.

PATENT, see LAND.

PAYMENT, see DEFENSE.

PERSONAL PROPERTY.

1. Defined, see *Kahinu vs. Aea*, 68.

See WOOD: MORTGAGE, 6, 7, 8, 13.

PLEADING.

1. Demurrer is not plea in bar: if overruled, judgment on the record is given. *Thompson vs. Montgomery*, 21.
 2. Plea in abatement suggests defects in form and substance: if overruled, defendant may answer over. *Ib.*
 3. Police Court Summons. *Larrisch vs. Schaefer*, 140.
 4. Objections as to form must be made before trial in lower Court. *Ib.*
 5. Taking testimony, on collateral facts involved upon demurrer, allowed, under §§1112, 1113, Civil Code. *Bishop vs. Everett*, 157.
 6. The Court deprecates loose and epistolary pleading, and suggests that attorneys be personally mulcted in costs. *Palake vs. Paakaula*, 269.
 7. Demurrer sustained to bill for dissolution of partnership, for non-joinder of representatives of deceased partner, and because partnership agreement, though annexed to the bill, was not made part thereof. *Lam Chock vs. Chun Wa*, 305.
 8. Where a party has obtained judgment on demurrer on some of his grounds, he is not barred from presenting grounds overruled in the first demurrer, in another demurrer to an amended complaint. *Kerr vs. Hyman*, 308.
 9. Complaint in action for malicious prosecution held to sufficiently traverse the facts which led to the prosecution. *Ib.*
 10. In suit to cancel deed it must be alleged that deed is in defendant's possession or that he claims an interest in it. *McKeague vs. Neisser*, 461.
 11. Where one agreement refers to another, some averment disposing of the latter should be made. *Ib.*
 12. It is not proper to style an action of assumpsit "Trespass on the case upon promises:" but it appearing from the declaration that the action is assumpsit, the objectionable averment is treated as surplusage. *Wilder vs. Hop Wo Wai*, 652.
- See LANDLORD AND TENANT, 9, 12: BANKRUPTCY, 8: EQUITY, 11: TAX, 7: MALICIOUS PROSECUTION: ARREST, 1: SET OFF, 1: MANDAMUS, 3, 4, 9.

PLEDGE.

1. Pledging of securities by executor held unauthorized but not fraudulent: and the pledgees not being put on enquiry, the Court declines to compel them to give up the securities. *Cartwright vs. Allen*, 355.
2. Pledge of stock as collateral security, made by delivery of certificate without endorsement, vests only equitable title in pledgee: legal title remains in pledgor and passes to his assignee in bankruptcy. *Smith vs. Castle*, 697.

See MORTGAGE.

POLICE COURT, see COURT.

POUND, see IMPOUNDING.

POWER OF ATTORNEY, see ATTORNEY IN FACT.

PRACTICE, see APPEAL: ARREST: ATTACHMENT: ATTORNEY: COURT: CRIMINAL LAW: EQUITY: EVIDENCE: EXECUTION: GARNISHEE: JUDGMENT: NEW TRIAL: PARTIES: PLEADING: PROBATE LAW: RULES.

PRINCIPAL AND SURETY.

1. Manager and part-owner of incorporated sugar plantation held to be surety, and not principal, on a mortgage given by the corporation as security for advances: and entitled to compel the corporation to pay the debt or indemnify him. *Macfie vs. Kilauea Sugar Co.*, 440.

PRISON. Authority of Marshal over prisoners. See *In Re Apuna*, 732.

PROBATE LAW.

- A. PROBATE AND CONSTRUCTION OF WILL, 1 to 11.
- B. EXECUTORS AND ADMINISTRATORS, 12 to 19.
- C. GUARDIAN AND WARD, 20 to 21.
- D. DOWER AND CURTESY, 22 to 23B.
- E. DESCENT AND HEIRSHIP, 24 to 28.
- F. JURISDICTION AND PRACTICE, 29 to 37.

A. PROBATE AND CONSTRUCTION OF WILL.

1. Same amount of proof is required for revoking probate on ground of forgery, as would sustain conviction on criminal charge for forgery. *Estate of Keliiahonui*, 1.
2. Will construed to intend that property shall be held in trust for widow and son, with remainder in fee to son. *Zupplein vs. Austin*, 8.
3. Devise to son held not to lapse by his death before his mother. *Ib.*

4. Trust deed, admitted to probate as a will, confers no rights as against grantees under a later absolute deed. *Kahoiwai vs. Paakuku*, 124.
5. To authorize probate of a lost will, parol proof of its contents must be strong and free from doubt. *Estate of Kekauluohi*, 172.
6. History and effect of "Kauchas." *Ib.*
7. Land Commission Award, made later than alleged lost will, is conclusive against right to prove the will. *Ib.*
8. Absolute deed, admitted to probate as a will, is conclusive on all parties unless probate is revoked. *Pupuka vs. Maiwela*, 367.
9. Devise by husband to wife of all his property, held not to come within Rule in Shelley's Case, and to give wife a life estate. *Chillingworth vs. Lindsey*, 692.
10. Estate in fee held to be created by devise in will, though there was no limitation to heirs of devisee: and a condition against alienation held to be incompatible with estate to which it is annexed, and void. *Kahanaiki vs. Kohala Co.*, 694.
11. Devisee held not estopped by his conduct from claiming estate in fee. *Ib.*

B. EXECUTORS AND ADMINISTRATORS.

12. Although in early days administrators held realty of decedents, yet after their discharge their possession became adverse to heirs. *Kahukuleionohi vs. Kaikainahaole*, 183.
13. Borrowing money and pledging securities by executor held unauthorized but not fraudulent: and pledgees are not compelled to give up securities, not having been put upon enquiry. *Cartwright vs. Allen*, 355.
14. Purchaser at administrator's sale of real estate held to be *bona-fide* purchaser without notice, as against claim of an heir, made ten years later, that sale was in fraud of her rights. *Beckley vs. Afong*, 545.
15. Action of trespass *quare clausum* abates on death of plaintiff and does not pass to executors. *Bishop vs. Lokana*, 556.
16. Devisee, not personal representative, of deceased owner, is proper person to be sued for recovery of amount of mortgage released by mistake. *Kapena vs. Kaleleonalani*, 579.
17. Discharge of executors of deceased partner postponed till winding up of partnership. *Estate of Unna*, 606.
18. Commissioner appointed to sell real estate of decedent is not obliged to hire licensed auctioneer. *Adams vs. Parke*, 276.
19. See PARTNERSHIP, 9.

C. GUARDIAN AND WARD.

20. A minor, being a trustee at date of a decree made by consent of guardian *ad litem*, is not entitled to a day in Court after her majority, to disaffirm. *Beckley vs. Afong*, 545.
21. A decree made by consent of counsel, without fraud or collusion, cannot be set aside. *Ib.*

D. DOWER AND CURTESY.

22. Husband held entitled to all his rights in wife's estate, the marriage being voidable, not void, and voidability ceasing on wife's death. *Estate of Gordon*, 289.
23. Widow may be barred of dower by adverse possession of heir or devisee of husband, but her ouster must be shown. *Makauhana vs. Pua*, 651.
- 23A. Widow's claim for Dower held repugnant to trust-deed made for her benefit. *Long vs. Pfluger*, 72.
- 23B. Tenant by curtesy has right to lease land inherited by his children from their mother. *Hanuna vs. Unna*, 485.

E. DESCENT AND HEIRSHIP.

24. Proceedings to discover unknown heirs must be instituted in Probate, before a Court of Equity can make a decree against them. *Kaopua vs. Keelikolani*, 123.
25. Claim of heirship, based on alleged affiliation by a chief of a child whose mother had another "kane," disallowed. *Estate of Moehonua*, 338.
26. Estate distributed among claimants whose heirship is proved. *Ib.*
27. Estate of decedent held to descend, one half to his widow, and one half to child of his half brother: and grandson of his sister excluded. *Aihonua vs. Ahi*, 410.
28. See *ante*, 2, 9, 10.

F. JURISDICTION AND PRACTICE.

29. Decree of distribution does not bar adverse claim by party who has not had proper notice to appear. *Mikalemi vs. Luau*, 47.
30. Proceedings on distribution, though irregular, cannot be attacked in suit by heirs to foreclose mortgage: no appeal or writ of error having been taken from decree in probate. *Burgess vs. Cooper*, 88.
31. Court of Equity can enquire into jurisdiction of Court of Probate. *Adams vs. Parke*, 276.
32. An appeal lies from Circuit Judge in Probate to Supreme Court in Banco. *Pupuka vs. Maiwela*, 367.

33. A party taking under a will does not take subject to construction placed on the will by the Probate Court. *Kini vs. Napua*, 411.
34. Decree was made in 1859, ordering conveyance of minor's estate: held, petition in 1884 to set decree aside is not barred by Statute of Limitations, because minor married before she became of age, and her disability of coverture was not removed till 1881. *Beckley vs. Afong*, 545.
35. Decree made by consent of counsel, without fraud or collusion, cannot be set aside. *Ib.*
36. Temporary injunction granted by Court of Equity, against an ejectment suit, to allow material question as to probate of will to be settled in Probate Court. *Pahuilima vs. Kela*, 573.
37. See PARTNERSHIP, 7: SET OFF, 2.

PROHIBITION, see MANDAMUS.

QUARANTINE.

1. Steamer from China landed all her passengers in quarantine, two of whom had smallpox: held, steamer was liable for expenses of all the passengers, and Board of Health had right to require bond of indemnity before allowing steamer to depart. *Peterson vs. Carter*, 283.
2. Steamer was libelled for quarantine expenses, and released on bond: common law action was brought on bond: when steamer next arrived, she was again libelled for same cause: held, that as common law suit was still pending, admiralty suit must abate. *The Mee Foo*, 294.
3. Steamer held not liable for clandestinely bringing smallpox into the Kingdom. *The Nebraska*, 100.

QUEEN, see KING.

QUIA TIMET, see PRINCIPAL AND SURETY.

REAL PROPERTY.

1. Real property, as defined by §§ 483 and 484 Civil Code, must be held to be the same property so designated in American and European Law. *Kahinu vs. Aea*, 68.
2. Plaintiff, who made improvements on another's land, cannot recover their value, although the owner of the land knew of the improvements and did not object. *Waiaha vs. Naholowaa*, 271.

See BOUNDARY: DEED: FIXTURE: LAND: LANDLORD AND TENANT: MORTGAGE: REMAINDER.

RECEIVER.

1. Receiver, appointed to carry on a sugar plantation on which were outstanding mortgages, held to have a prior lien on receipts of the

plantation, but not on the corpus of the property, as against mortgagee.
Unna vs. Brown, 676.

See PARTNERSHIP.

RECORD, see CRIMINAL LAW, 12: PLEADING, 1.

RECORDED INSTRUMENT.

1. Parol assignment of mortgage, accompanied by endorsement of note and delivery of mortgage, is valid. *Hackfeld vs. Akina*, 114.
2. Acknowledgment of a chattel mortgage being defective, for failure of notary to affix seal and comply with statutory requirements, the mortgage was not entitled to be recorded, and the recording must be treated as a nullity. *Lenehan vs. Akana*, 538.
3. A subsequent purchaser of land held to be put on enquiry as to a former sale of the land by the vendor, though not of record. *Green vs. Pope*, 235.
4. There is wide distinction between effect of recording chattel mortgage and one of real estate. *Lenehan vs. Akana*, 540.

RECOUPMENT, see SET OFF.

REFEREE, see EQUITY, 20.

REFORMING OF INSTRUMENT, see CANCELLATION: DEED:
EQUITY: FRAUD: MISTAKE.

RELEASE, see PARTNERSHIP, 9.

REMAINDER. Son held to have remainder after life-estate of mother.
Zupplein vs. Austin, 8.

RENT, see LANDLORD AND TENANT.

REPLEVIN, see EQUITY, 18.

ROBBERY, see CRIMINAL LAW, 14.

ROYAL PATENT, see LAND.

RULE IN SHELLEY'S CASE, see *Chillingworth vs. Lindsey*, 692.

RULES OF SUPREME COURT.

VIII. See *Kahula vs. Kuamu*, 226.

XXVII. In *Re Congdon*, 635.

SALARY.

1. Salaries in Appropriation Bill are payable monthly. *Macfarlane vs. Green*, 711.
2. Plaintiff held not entitled to salary as Chamberlain, because absent from the country. *Id.*

SALE.

1. Absolute bill of sale of vessel, though made in fraud of creditors,

cannot be varied by purchaser by parol evidence that transfer was merely as security for advances. *Dowsett vs. Smith*, 60.

2. Delivery of bananas on steamer wharf to a servant of the buyer, held to be a sale and delivery. *Kapu vs. McNerny*, 263.

See CONTRACT, 4: FRAUD, 8.

SALE OF LAND, see DEED: LAND: MORTGAGE: SPECIFIC PERFORMANCE.

SALVAGE, see MARITIME LAW, 7.

SEAL, see RECORDED INSTRUMENT.

SEAMAN, see MARITIME LAW.

SEARCH WARRANT, see CRIMINAL LAW, 19, 20.

SECURITY, see MORTGAGE: PLEDGE.

SERVANT, see MASTER AND SERVANT.

SET OFF.

1. A set-off held to be properly pleaded, and to be a demand of like kind with plaintiff's claim. *Keliikanakaole vs. Hopkins*, 516.
2. Claim paid by debtor of intestate, after intestate's death, to creditor of intestate, cannot be set off against debtor's own promissory note to intestate. *Selig vs. Chulan*, 627.
3. See *Hop vs. Parke*, 688.

SHARE, see CORPORATION: PLEDGE.

SHELLEY'S CASE, see *Chillingworth vs. Lindsey*, 692.

SPECIFIC PERFORMANCE.

1. Specific performance decreed of contract for sale of land, it appearing that the contract was absolute and not conditional: that vendor waived tender of deed or purchase price: and that a subsequent purchaser from the vendor was put on enquiry. *Green vs. Pope*, 235.

See LAND.

STATUTES.

1. Constitutionality of a law may be raised by *habeas corpus*. *Gip Ah Chan*, 25.
2. Law may be declared unconstitutional, when. *Ib.*, 34.
3. Where statute confers on Government right to take private property for public use, every form and particular required by such statute must be complied with. *In Re Fort St.*, 638.
4. Where Constitutional question is raised before a single Justice, he should reserve the question for the Full Court. *The King vs. Luce*, 686.

STATUTES. See STATUTES CITED: STATUTE OF FRAUDS:
STATUTE OF LIMITATIONS.

STATUTES CITED.

N.B.—Most of the citations are to the Civil Code and Session Laws. The Compiled Laws comprise Civil Code and Session Laws to 1882 inclusive. Numbered sections of Civil Code and Compiled Laws are identical.

CIVIL CODE.

Sec.	34,	Comp. Laws,	page	9.	<i>Gulick vs. Flowerdew</i> ,	432.
"	39,	"	"	10.	"	430.
"	40,	"	"	"	"	"
"	42,	"	"	11.	"	432.
"	167,	"	"	39.	"	"
"	184 to 187,	Comp. Laws,	pages	41 and 42.	<i>In Re Fort St.</i> ,	639.
"	206,	"	"	page 48.	<i>In Re Apuna</i> ,	738.
"	221,	"	"	51.	"	"
"	295,	"	"	74.	<i>Hutchison vs. Nebraska</i> ,	100.
"	296,	"	"	"	<i>Peterson vs. Carter</i> ,	285.
"	298,	"	"	75.	"	"
"	306,	"	"	76.	"	286.
"	387 to 392,	"	"	92, 93.	<i>Hatton vs. Piopio</i> ,	334.
"	"	"	"	"	<i>Shipman vs. Comm'rs</i> ,	353.
"	396,	"	"	94.	"	354.
"	422.	See Laws of 1876,	Ch. 55,	§ 24.	<i>Hackfeld vs. Akina</i> ,	114.
"	424.	"	"	"	"	"
"	483.	See Comp. Laws,	pp. 119, 120,	§§ 15, 16.	<i>Kahinu vs. Aea</i> ,	69.
"	"	"	"	"	<i>McBryde vs. Kala</i> ,	531.
"	484.	"	"	p. 119, §§ 13, 14.	<i>Kahinu vs. Aea</i> ,	69.
"	492.	"	"	pp. 123, 124, §§ 32-35.	<i>In Re Richardson</i> ,	216.
"	495.	"	"	p. 126, § 52.	<i>Thompson vs. Montgomery</i> ,	23.
"	502.	"	"	p. 127, § 56.	"	"
"	503.	"	"	pp. 127, 128, §§ 57, 58	"	"
"	506.	"	"	p. 129, § 61.	"	"
"	507.	"	"	p. 128, § 58.	<i>Minister vs. Knudsen</i> ,	321.
"	513.	"	"	p. 130, § 67.	<i>Kupau vs. Richards</i> ,	245.
"	625,	Comp. Laws,	page	177.	<i>In Re Brown</i> ,	705.
"	626,	"	"	178.	"	"
"	685,	"	"	195.	<i>In Re Apuna</i> ,	738.
"	819,	"	"	236.	<i>McBryde vs. Kala</i> ,	530.
"	820,	"	"	"	<i>Hing Yee vs. Chung Wa</i> ,	304.
"	823,	"	"	"	<i>Waiaha vs. Naholowaa</i> ,	274.
"	"	"	"	"	<i>The King vs. Robertson</i> ,	725.

STATUTES CITED.

CIVIL CODE.

Sec.	829,	Comp. Laws,	page	237.	<i>Alexander vs. Fornander</i> , 323.
"	"	"	"	"	<i>McBryde vs. Kala</i> , 530.
"	841,	"	"	240.	<i>Haw'n Gov't vs. Brown</i> , 753.
"	852,	"	"	243.	<i>Adams vs. Parke</i> , 279.
"	855,	"	"	"	<i>In Re Apuna</i> , 734.
"	915,	"	"	267.	<i>Nakamura vs. Haalilio</i> , 658.
"	940,	"	"	274.	<i>In Re Hobron</i> , 408.
"	953,	"	"	278.	<i>In Re Congdon</i> , 635.
"	956.	See Comp. Laws,	pp. 279-284.		<i>Everett vs. Bolles</i> , 156.
"	969,	Comp. Laws,	page	286.	<i>Bkptcy. of Padeken</i> , 170.
"	977,	"	"	289.	<i>Kerr vs. Hyman</i> , 309.
"	978,	"	"	"	<i>Adams vs. Bishop</i> , 121.
"	"	"	"	"	<i>Bishop vs. Davies</i> , 520.
"	983,	"	"	290.	<i>Bkptcy. of Allen</i> , 147.
"	1007,	"	"	297.	<i>Pupuka vs. Maiwela</i> , 368.
"	1021,	"	"	301.	<i>Holmes vs. Soper</i> , 565.
"	1022,	"	"	"	<i>Everett vs. Bolles</i> , 154.
"	1053,	"	"	309.	<i>Hackfeld vs. Akina</i> , 114.
"	1080 to 1095,	Comp. Laws,	page	315.	<i>The King vs. Robertson</i> , 729.
"	1099,	Comp. Laws,	page	320.	<i>In Re Congdon</i> , 635.
"	1102,	"	"	321.	<i>Lishman vs. Giles</i> , 262.
"	1113,	"	"	324.	<i>Bishop vs. Everett</i> , 158.
"	1117,	"	"	325.	<i>Kerr vs. Hyman</i> , 301.
"	1120,	"	"	326.	" " " "
"	1124,	"	"	327.	<i>Holmes vs. Soper</i> , 565.
"	1146,	"	"	332.	<i>Watson vs. Akanalilii</i> , 571.
"	1148,	"	"	"	" " " "
"	1156,	"	"	335.	<i>Kahula vs. Kuamu</i> , 226.
"	1255,	"	"	406.	<i>Lenehan vs. Akana</i> , 540.
"	1262,	"	"	409.	<i>Hackfeld vs. Akina</i> , 114.
"	1263,	"	"	"	<i>Lenehan vs. Akana</i> , 540.
"	1284,	"	"	423.	<i>Estate Gordon</i> , 289.
"	1286,	"	"	425.	<i>Aho vs. Ahuna</i> , 151.
"	"	"	"	"	<i>Kupele vs. Kahananui</i> , 213.
"	1287,	"	"	426.	<i>Naweli vs. Auld</i> , 299.
"	1288,	"	"	"	<i>Hanuna vs. Unna</i> , 486.
"	1312,	"	"	431.	<i>Long vs. Pfluger</i> , 85.
"	1313,	"	"	432.	<i>Estate Gordon</i> , 289.
"	1314,	"	"	"	" " " " 290.
"	1418 to 1420,	Comp. Laws,	page	461.	<i>Gip Ah Chan</i> , 25.
"	1423,	Comp. Laws,	page	462.	<i>Nakamura vs. Haalilio</i> , 657.

STATUTES CITED.

CIVIL CODE.

- Sec. 1425, Comp. Laws, page 463. *Gip Ah Chan*, 25.
 " 1433, " " " 468. *Smith vs. Castle*, 699.
 " 1448, " " " 474. *Aihonua vs. Ahi*, 410.
 " 1454, " " " 477. " " " "
 " " " " " " *Kahuaku vs. Union Mill*, 487.
 " 1464, " " " 479. *Aho vs. Ahuna*, 151.
 " 1477, " " " 481. *Hatton vs. Piopio*, 336.
 " 1478, " " " " *Koa vs. Kaahanui*, 167.

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- Art. 5, Const. of 1864 and 1887. *In Re Apuna*, 734.
 " 6, " " " " " " " " "
 " 9, " " " " " " *The King vs. Luce*, 686.
 " " " " " " *In Re Apuna*, 734.
 " 12, " " " " " " " " "
 " 14, " " " " " " " " "
 " 42, " " 1864 only. *The King vs. Robertson*, 729.
 " 59, " " 1887 only. *Kaili vs. Inspectors*, 669.
 " 67, " " 1864 and 1887. *Alexander vs. Fornander*, 323.
 " " " " " " *McBryde vs. Kala*, 530.
 " 80, " " 1887 only. *Kaili vs. Inspectors*, 670.

PENAL CODE.

- Chap. 6, Sec. 1, Page 8. *The King vs. Gibson*, 311.
 " 13, " 9, " 21. *Estate Gordon*, 290.
 " 14, " 12, " 25. *In Re Rhodus*, 345.
 " 16, " 12, " 31. *Koa vs. Kaahanui*, 168.
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 " 32, " 3, " 75. *The King vs. Gibson*, 312.
 " 36, " 7, " 84. *The King vs. Grieve*, 740.
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 " 48, " 3, " 115. *The King vs. Luce*, 684.
 " 51, " 2 to 7, " 122. *In Re Apuna*, 737.

SESSION LAWS.

1846. Page 266, Sec. 8, 9. *The King vs. Robertson*, 728.
 1860. Page 19, Sec. 9. See Comp. Laws, p. 125, §§ 40-42. *Alexander vs. Fornander*, 323; *In Re Richardson*, 216.
 1862. Page 14. See Comp. Laws, p. 317, § 10. *The King vs. Robertson*, 729.
 1864. Page 25, Sec. 2. See Comp. Laws, p. 278, § 2. *Bkptcy. Ching On*, 287.

STATUTES CITED.

SESSION LAWS.

1864. Page 69. See Comp. Laws, p. 523. *Kaleleonalani vs. Commissioners*, 460: *Kapena vs. Kaleleonalani*, 579.
1866. Page 12. See Comp. Laws, p. 525. *Kapena vs. Kaleleonalani*, 582.
- “ Page 17, Sec. 2. See Comp. Laws, p. 316. *The King vs. Robertson*, 727.
1868. Pages 14-20. See Comp. Laws, pages 221-234. *Thompson vs. Montgomery*, 23.
1870. Chap. 8, See Comp. Laws, p. 43. *In Re Fort St.*, 640.
- “ “ 22, Sec. 4. See Comp. Laws, p. 541. *Beckley vs. Afong*, 547.
1872. Chap. 28, Sec. 3. See Comp. Laws, page 407. *Lenehan vs. Akana*, 540.
- “ Chap. 32. See Comp. Laws, p. 41. *In Re Fort St.*, 641.
1874. “ 22. “ “ “ p. 267. *Nakamura vs. Haalilio*, 657.
- “ “ 48. “ “ “ p. 569. *Watson vs. Akanalili*, 572.
- “ “ 58, Sec. 2. See Comp. Laws, pages 122, 123. *In Re Richardson*, 216.
1876. Chap. 32, Secs. 32-34. See Comp. Laws, p. 369. *Haw'n Gov't vs. Brown*, 753.
- “ Chap. 32, Sec. 49. See Comp. Laws, p. 375. *Pahukula vs. Parke*, 211.
- “ Chap. 33. See Comp. Laws, p. 381. *In Re Akana*, 254.
- “ “ 34. “ “ “ p. 385. *Bishop vs. Lokana*, 557.
- “ “ 35, Sec. 1. See Comp. Laws, page 280. *Hackfeld vs. Kavanagh*, 660.
- “ Chap. 35, Secs. 5-9. See Comp. Laws, page 282. *Lee Ah Sue vs. Chu Kee*, 624.
- “ Chap. 39, Sec. 5. “ “ “ “ 588. *Riemenschneider vs. Wilson*, 379.
- “ Chap. 39, Sec. 15. “ “ “ p. 589. *In Re Hobron*, 409.
- “ “ 40, “ 1 and 2. “ “ “ page 338. *The King vs. Robertson*, 727.
- “ Chap. 40, Sec. 5. “ “ “ p. 339. *The King vs. Robertson*, 726.
- “ Chap. 40, Sec. 13. “ “ “ p. 341. *The King vs. Robertson*, 727.
- “ Chap. 40, Sec. 15. “ “ “ p. “ *The King vs. Gibson*, 312.
- “ Chap. 40, Sec. 34. “ “ “ p. 347. *The King vs. Robertson*, 726.

STATUTES CITED.

SESSION LAWS.

1876. Chap. 57. See Comp. Laws, p. 397. *Kapena vs. Kalele-onalani*, 582.
1878. Chap. 11, Sec. 1. " " " p. 472. *Heeia vs. Kahana-moku*, 385.
- " Chap. 15, Sec. 2. " " " p. 389. *Asing vs. Aiona*, 281.
1880. " 1, Art. 6. " " " p. 631. *The Jennie Walker*, 404.
1882. Chap. 43, Sec. 16. " " " p. 120. *McBryde vs. Kala*, 531.
- " Chap. 43, Sec. 32. " " " p. 123. *Brewer vs. Luce*, 555.
- " " " " 40. " " " p. 124. *McBryde vs. Kala*, 530.
- " " " " 50. " " " p. 126. " " " 529.
1884. Chap. 35, Sec. 12. *Austin vs. Michiels*, 595.
- " " " " 14. *Cartwright vs. Hoffnung*, 604.
- " " " " " *Parke vs. See Hop*, 749.
1886. " 41, " 5. *In Re Ah Mook*, 665.

STATUTE OF DESCENTS, see LAND: PROBATE LAW.

STATUTE OF FRAUDS.

1. A bill in equity is an "action," and a gift of land is a "contract for sale of lands," within the statute. *Mokuai vs. Kapuniai*, 160.

See RECORDED INSTRUMENT: TRUST, 8.

STATUTE OF LIMITATIONS.

1. After discharge of administrator, his possession of land is adverse to heirs, and the statute begins to run. *Kahukuleionohi vs. Kaikainahaole*, 183.
2. Although there is no prescription against the State, the King, as an individual, cannot claim the immunity. *Harris vs. Carter*, 195.
3. Court of Equity declines to enjoin proceedings in action of ejectment, because the right of plaintiff therein to recover could only be barred by the full running of statutory period of 20 years. *Pahu-ilima vs. Kela*, 573.
4. Long acquiescence in adverse possession, though not a bar, held to be significant. *Kanaloa vs. Quinn*, 700.

See LAND: PROBATE LAW.

STOCK, see CORPORATION: PLEDGE.

STREET.

1. Minister of Interior has no right to grant franchise for tramway on streets of Honolulu. *Gulick vs. Flowerdew*, 414.

2. Award of Commissioners as to damages and betterments for widening street set aside, for failure to comply with statute. *In Re Fort St.*, 638.

SUBROGATION, see LAND, 3.

SUGAR PLANTING, see TAX, 5, 8, 9, 12, 17: PARTNERSHIP, 5: MASTER AND SERVANT, 2, 3, 5: PRINCIPAL AND SURETY: CONTRACT, 2, 3, 4: FRAUD, 8: MORTGAGE, 10, 15.

SUMMARY POSSESSION, see LANDLORD AND TENANT.

SUMMONS, see COURT: PLEADING.

SUPREME COURT, see COURT.

SURETY, see PRINCIPAL AND SURETY.

SURVEY, see LAND.

TAX.

1. Delinquent taxpayer held "qualified to vote:" and mandamus issued to compel issuance of certificate. *Thompson vs. Montgomery*, 21.
2. Taxpayer failed to give list of property to assessor, and assessor made *ex parte* assessment: held, not to deprive taxpayer of his right to appeal. *In Re Richardson*, 216.
3. Mandamus issued to compel tax-collector to grant certificate of appeal. *Ib.*
4. A Mormon minister comes within the statute exempting "clergymen" from personal taxes. *Kupau vs. Richards*, 245.
5. Tax on growing cane, planted on mill's land by outside planters, held wrongly assessed to the mill, the crop being property of the planter. *Wailuku Sugar Co. vs. Aholo*, 267.
6. Proceeding to collect delinquent taxes is *in rem* and also *in personam*: where judgment is asked against owner of real estate, it is *in personam*, and owner must be served with process. *Minister Finance vs. Knudsen*, 320.
7. Averment of demand for payment of tax is fundamental. *Ib.*
8. On question of over-valuation, failure to appeal to Tax Appeal Board, leaves assessment fixed: and reduction cannot be obtained by action at law. *Alexander vs. Fornander*, 322.
9. To tax irrigation ditch, and also water flowing through it, is double taxation. *Ib.*
10. Questions of over valuation or wrong ownership should be settled by the Court of Tax Appeals: but the Supreme Court has jurisdiction of cases of statutory construction or involving prin-

ciples of law: which includes double taxation. *McBryde vs. Kala*, 529.

11. Under Tax Law of 1882, taxation of a "debt" is illegal. *Ib.*
 12. Taxing water as property of a Ditch Co., and again as increasing the value of irrigated land, held to be double taxation. *Haiku Sugar Co. vs. Fornander*, 532.
 13. The question is not merely one of valuation. *Ib.*
 14. Signing an assessment blank held to be waived by failure of assessor to require it, and duty of taxpayer to file written notice of appeal held also to be waived. *Aikoe vs. Hayselden*, 534.
 15. Mandamus issued to compel assessor to grant certificate of appeal. *Ib.*
 16. Reserve-fund of a corporation, consisting of credits, is not taxable. *Brewer vs. Luce*, 554.
 17. Sugar was laden on a vessel at Honolulu prior to July 1st, and bills of lading were mailed to foreign consignees: ship sailed at noon of July 1st: held, the sugar was taxable to the shippers. *Ib.*
- TELEPHONE, see *Oriental Co. vs. Bell Co.*, 393; *Waianae Co. vs. Bell Co.*, 589.

TENANT, see LANDLORD AND TENANT.

TENDER, see SPECIFIC PERFORMANCE: MORTGAGE, 5.

TITLE, see LAND: REAL PROPERTY.

TRAMWAY, see *Gulick vs. Flowerdew*, 414.

TREASON, see CRIMINAL LAW, 10.

TREATY.

1. Treaty provisions held not to apply to foreign creditors who object to a bankrupt's discharge. *Bkptcy. of Allen*, 146.
2. German Treaty cited as to arrest of deserters at Consul's request. *In Re James Brown*, 705.

TRESPASS.

1. District and Police Justices have no jurisdiction to try Trespass *quare clausum fregit*, where the plea is *liberum tenementum*. *In Re Kameeui*, 542.
2. Action of Trespass *quare clausum fregit* abates on death of plaintiff. *Bishop vs. Lokana*, 556.
3. Action for trespass for damage to trader by a creditor seizing his goods and forcing him into bankruptcy, does not pass to the assignee. *Austin vs. Michiels*, 595.

See TROVER: FENCE: PLEADING, 12: INJUNCTION, 10.

TROVER.

1. Creditor, who took possession of debtor's goods, held liable to debtor's assignee in bankruptcy for goods bought by debtor from outside parties. *Austin vs. Michiels*, 611.
2. Value of goods, at date of conversion, as per inventory, less expenses of auction sale, held to be measure of damages. *Ib.*

See TRESPASS.

TRUST.

1. Trust-estate of widow for life, with remainder in fee to son, considered. *Zupplein vs. Austin*, 8.
2. Trust deed, for benefit of wife and children, construed: and held to be terminated by second marriage of the wife. *Long vs. Pfluger*, 72.
3. Son by former marriage held to acquire no title under trust-deed made for benefit of second wife and her children. *Ib.*
4. While there is no resulting trust to a husband in his wife's land, paid for with his money, yet here the wife's name was fraudulently inserted in the Royal Patent, and the Court establishes the trust. *Kaiawahakena vs. Makapu'u*, 188.
5. Mausoleum of King Lunalilo held to be property of the Trustees under the Will authorizing its erection. *Smith vs. Wilder*, 228.
6. The Court declines to declare a deed absolute in form a trust deed, there being no fraud or mistake. *Manu vs. Campbell*, 382.
7. Defendants held to be trustees for plaintiffs as to certain land, the facts being such as to put defendants on enquiry. *Keawe vs. Parker*, 489.
8. Such trust can be proved by parol, and is not within Statute of Frauds. *Ib.*

See PROBATE LAW, 4: MORTGAGE, 14.

USAGE, see CUSTOM.

USE, see TRUST.

VENDOR AND VENDEE, see DEED: LAND: SPECIFIC PERFORMANCE.

VERDICT, see COURT: NEW TRIAL.

VOTER, see ELECTIONS.

WAIVER, see APPEAL, 2: SPECIFIC PERFORMANCE: TAX, 14: ESTOPPEL.

WARRANT, see CRIMINAL LAW, 2, 19, 20: ARREST.

WARRANTY, see HORSE: DEED, 10, 11.

WATER.

1. Award of Water Commissioners set aside, it being based on

theory that a Lele was entitled to water from the Ahupuaa. *Wailuku Sugar Co. vs. Widemann*, 185.

2. Appellate Court has same powers as the Commissioners. *Ib.*, 188.
3. Damages awarded to plaintiffs for diversion of water by defendants, but proportionately lessened for failure of plaintiff to comply with order of Water Commissioners to keep water-course cleaned out, and because plaintiffs have allowed defendants to neglect to furnish water on the designated days. *Mele vs. Ahuna*, 346.
4. Mandamus lies against Superintendent of Honolulu Water Works for violation of his duty. *Riemenschneider vs. Wilson*, 375.
5. Government may make rules as to use of water, and deprive of his water privilege a party breaking the rules. *Ib.*
6. Taxing water as property of a Ditch Co., and again as increasing value of irrigated land, is double taxation. *Haiku Sugar Co. vs. Fornander*, 532.
7. Taxing ditch, and also water flowing through it, is double taxation. *Alexander vs. Fornander*, 322.

WIDOW, see HUSBAND AND WIFE: PROBATE LAW.

WIFE, " " " " " "

WILL, see PROBATE LAW.

WITNESS, see EVIDENCE.

WOOD.

Driftwood, found on or near the shore, belongs to the finder, who exercises ownership over it. *Koa vs. Kaahanui*, 167.

WORDS AND PHRASES.

Ahupuaa,	see <i>Harris vs. Carter</i> , 195.
Ao,	" <i>Kahanaiki vs. Kohala</i> , 695.
Articles,	" <i>The King vs. Luce</i> , 685.
Christian	" <i>Kupau vs. Richards</i> , 245.
Clergyman,	" " " " "
Colluding,	" <i>Kerr vs. Hyman</i> , 309.
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Crown Lands,	" LAND.
Debt,	" <i>Kerr vs. Hyman</i> , 309.
"	" <i>Lee Ah Sue vs. Chu Kee</i> , 623.
"	" <i>McBryde vs. Kala</i> , 531.
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Ili,	" <i>Harris vs. Carter</i> , 195.
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WORDS AND PHRASES.

- Judge, see *In Re Akana*, 254.
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Tenant, " *Hatton vs. Piopio*, 335.
Treason, " *The King vs. Gibson*, 311.
Void and Voidable, see *Kanamu vs. Parke*, 94.